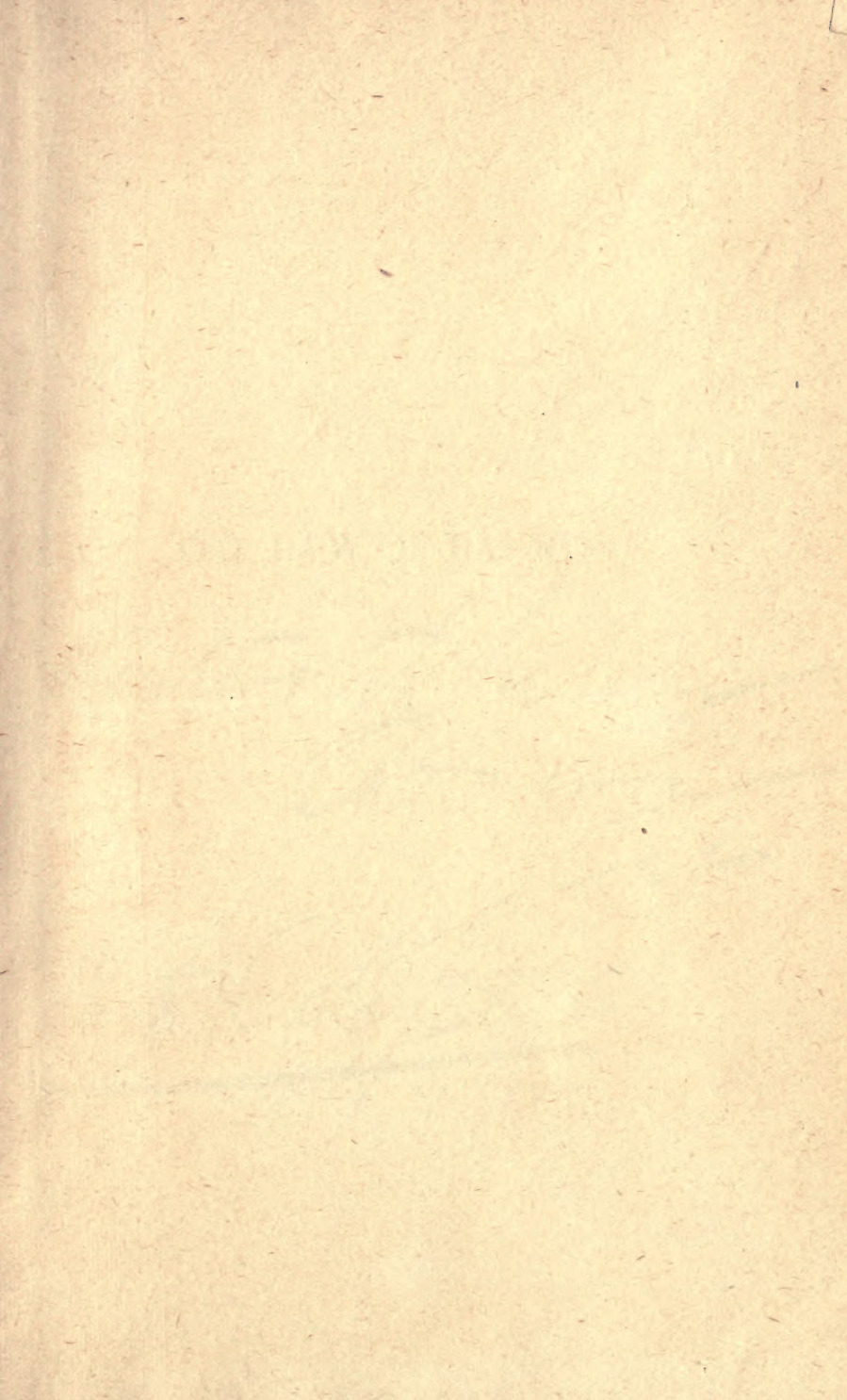




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BY

SIR JOHN PAGET, BART., K.C.

LATE GILBART LECTURER

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THE LORD STERNDALE
MASTER OF THE ROLLS

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PREFACE TO THIRD EDITION

SINCE the last edition of this book was published, the trend of judicial decision has been, on the whole, favourable to bankers. The obligations of the customer to the banker with regard to drawing cheques have been re-established on the proper footing by the House of Lords.

There are still prejudicial anomalies to be remedied, if not by the Courts, by the Legislature: such as post-dated cheques, and the banker's position on bankruptcy of his customer, aggravated as this is by the practice of suspending the publication of receiving orders.

J. R. P.

TEMPLE, *August*, 1922.

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THE LAW OF BANKING

CHAPTER I

THE BANKER

THE Bills of Exchange Act never speaks of a Bank. The term employed is always "Banker." "Banker" is the operative word in sect. 19 of the Stamp Act, 1853, and sect. 17 of the Revenue Act, 1883, under which documents not strictly cheques are brought within sect. 60 of the Bills of Exchange Act in the one case and the crossed cheques sections of the same Act in the other.

A cheque is a bill of exchange drawn on a "banker" payable on demand. Protection where payment is made on forged indorsement, in collecting crossed cheques or in paying crossed cheques is strictly confined to cases where one or both parties to the transaction is or are a "banker" or "bankers." Sect. 74 refers to the usage of bankers; the custom of bankers, recognised in law, can only be formed and proved by legitimate bankers. The question "What is a banker?" has been frequently discussed of late, and has arisen in practical form on more than one occasion, as by presentment of a crossed cheque otherwise than through a clearing bank by a person or undertaking not obviously fulfilling the accepted status of a banker.

Definitions have been incidentally attempted by the Legislature in statutes such as the Money-lenders Act, 1911, and the Finance Act (2), 1915. These acts afford no reliable guidance, even if available for the interpreta-

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tion of another statute. Take, for example, the terms used in the latter enactment (sect. 30): "Any bank carrying on a *bonâ fide* banking business in the United Kingdom," justly stigmatised by an eminent banking authority thus: "This cannot be called a definition, it is more like a helpless appeal for a definition." A bill was inaugurated by Government in 1921 with a view to the solution of the problem, but it never became law.

The Bills of Exchange Act itself gives no help. Its only reference to the matter is in sect. 2: "'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking," a pronouncement which has been the subject of much sarcasm and is usually read as the mere equivalent of the more familiar form "The singular includes the plural."

The question presents itself in two aspects.

First, as to the desirability of protecting the public from being induced to entrust their money to dubious concerns by the ostentatious adoption of the name "Bank."

There have been flagrant examples of this exploitation of the term with considerable success, and it is, no doubt, an evil, calling for remedy, but it does not fall within the purview of the present work.

Indeed, the interests of the community at large and the banks seem somewhat opposed in this connection.

Every suggestion of legislation in the public interest appears to involve the use of the term "*bonâ fide*." It might be difficult to set up one definition of a bank or banker for general use, and another as an interpretation section to the Bills of Exchange Act; but any importation or idea of *bona fides* with regard to the latter would be simply fatal. As things stand, the bank clerk to whom a crossed cheque is presented over the counter by a professing banker has a complicated question of law and one of fact, on which he has no evidence, to decide.

He must at once either pay or dishonour. If he does the first, he may lose all protection and perhaps have to pay twice ; if the second, he may be liable to his customer for damages for injury to credit. In electing which to do, he or the bank manager must make up his mind

(1) What is a banker ? (2) Is the presenting party a banker ?

Similarly when a crossed cheque is paid in by a customer, the collecting banker is not protected unless the drawee is really a banker.

To complicate this situation by introducing the element of *bona fides* would involve another vital decision being come to by the bank official in the case of every crossed cheque presented for payment otherwise than by an unquestionable "banker." Not only would he have to determine on the spur of the moment whether the party presenting was, in law and fact, "a banker," but he would be faced by the moral and well-nigh insoluble problem whether he was a *bonâ fide* "banker." And his position would be the same if a crossed cheque drawn on a concern not definitely recognised as a bank were paid in for collection by a customer.

As things stand, the real banker is in no way concerned with the *bona fides* of the professing banker. If the latter fulfils the necessary qualifications and characteristics of "a banker," he may be an impecunious and fraudulent person or combination of such characters, but all the same he is "a banker." On the other hand, if he do not fulfil those qualifications and characteristics, he is not "a banker," albeit he may pursue with integrity and ample resources an analogous and honourable calling.

The only true road to safety, both for the public and the banker, seems to lie in the scheme, propounded by those best qualified to judge, of an authoritative and conclusive register of bankers, analogous to the Medical Register, the Army List, or the Navy List. This, compiled

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after due investigation by a legally qualified tribunal and amended by the same as occasion might require, would supply a means of ready reference and prompt decision, open to the bank clerk and public alike.

Pending such relief, the banker has to take the responsibility of dealing or declining to deal with those who may or may not be "bankers." And the guidance to be derived from such legal decisions as exist is not by any means clear or conclusive.

The test suggested by Christian, L.J., in *Davies v. Kennedy*, I. R. 3 Eq., at p. 693, strikes one as being a fair one. "Was the business carried on what the ordinary intelligent commercial man would call the trade or business of a banker?" No doubt that judgment was a dissentient one, but it does not seem impugned by the other judgments in the case or those of the House of Lords in the same case, *sub nom. Copland v. Davies*, L. R. 5 H. of L. 358. There Lord Hatherley, C., says, at p. 375: "With regard to Mr. Kennedy, it is not disputed that he was a banker in the ordinary sense of the word, as receiving people's moneys and giving them receipts, receipts not as for transfers of property or anything of that kind, but receipts acknowledging the receipt of money, and issuing pass books and cheque books, and dealing with them in the ordinary way of a banker, that in every other sense he was a banker, but not in the sense of issuing notes for circulation."

The question there was whether the Act 33 Geo. II., c. 14, was confined to banks of issue; the last few words of this sentence have therefore no application here.

In *Shield's Case*, [1901] I. R. Ch., Fitzgibbon, L.J., says, at p. 199: "If a banker's business was confined to honouring cheques on demand he could not make any profit at all, those who take money 'on deposit' are just as much bankers as those who hold it on 'current account.'"

It is difficult to see the ground for the suggestion that a good current account, on which no interest is paid, is not as remunerative as a deposit account on which interest is paid; and the *dictum* that either deposit account or current account alone constitutes a banker is not in accord with other decisions.

Indeed, in the same case Lord Ashbourne points out that at the passing of the statute in question, 33 Geo. II., c. 14, cheques were in very rare use, and that it might in 1901 be plausibly argued that the honouring customers' cheques was an essential part of banking. In fact he well-nigh admits that it is so. (See pages 191, 195.)

In *In re Coe*, 3 De G. F. & J., 335, Turner, L.J., says: "Even that branch of the company's business which has most resemblance to banking differs materially from the ordinary business of bankers, for the company did not honour cheques payable on demand and drawn upon themselves."

In the *Birkbeck Building Society Case*, in the Court of Appeal, [1912] 2 Ch., at p. 227, Buckley, L.J., said: "It opened current and deposit accounts and in every essential particular, nay more, I think I may say, in every particular, it did that which a banker does in the course of a banking business, and offered its customers all such facilities as a bank commonly offers."

Some of the older *dicta* seem to give undue prominence to the deposit part of banking. In view of the provisions of the Bills of Exchange Act, and the later affirmation of cheque business as the leading feature of a bank concern, the scale would appear to have turned.

Again, looking at the crossed cheques sections of the Bills of Exchange Act, the consequent impossibility of cashing crossed cheques save through a banker, and the universal and legally encouraged use of crossed cheques, the collection of such cheques, and indeed of all cheques, must be regarded as an inherent part of a banker's

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business. It is therefore a fair deduction that no one and no body, corporate or otherwise, can be "a banker" who does not (1) take deposit accounts; (2) take current accounts; (3) issue and pay cheques drawn on himself; (4) collect cheques, crossed and uncrossed, for his customers.

One or two minor and somewhat obvious tests have been laid down.

Banking must be part of the man's known occupation. (*Adams v. Malkin*, 3 Campbell, 534.)

He must hold himself out as a banker and the public take him as such. (*Stafford v. Henry*, 12 Ir. Eq. R. 400.)

There must be an intention generally to get a living by so doing. (*Ex parte Paterson*, 1 Rose, 402.)

Next arises the question whether an individual, a partnership, or a company can be "a banker" who or which combines banking business with one or more other enterprises or undertakings.

If the banking business is subsidiary to another business or other businesses carried on by the same concern, that concern is not "a banker."

"If those acts did not form a substantial part of his business he was not a banker." (*Stafford v. Henry*, 12 Ir. Eq. R. 400.)

Referring to this case, Fitzgibbon, L.J., says, in *Shield's Case*, *ubi sup.*, at p. 199: "Such a case as that of Labertouche is easily understood. He carried on several classes of business, stock-broking, agency, and money-broking, including some banking business. It was held that banking was not his chief business, but was only ancillary to it, and therefore he was not a banker."

In the same case Lord Ashbourne says, at p. 196: "If a man carries on other businesses besides that of banking, and if the banking is only subsidiary to the other businesses, he cannot be regarded as a banker."

Finally, there is the general principle enunciated by

the Court in *Halifax v. Wheelwright*, L. R. 10 Ex. 193, that the statutory privileges and immunities accorded to bankers are based on and justified by the recognised high standing and probity of the profession; a doctrine not necessarily applicable to a concern which combines banking with other business.

Where only two businesses are carried on, one banking, the other not, of equal importance, so that neither can fairly be said to be subsidiary or ancillary to the other, there is some doubt.

In the old case of *Richardson v. Bradshaw*, 1 Atkins, 218, although a man kept twenty-six regimental accounts, his status as a banker appears to have been doubted on the ground of his having another occupation, and an issue was directed.

In *Furber v. Fielding*, 23 Times L. R. 362, where a similar question was incidentally raised on the wording of the Money-lenders Act, 1900, s. 6, exception (a), Phillimore, J., declined to decide it.

In *Edgelow v. MacElwee*, [1918] 1 K. B. 205, McCardie, J., said, "A man may follow concurrent callings. If one of such callings be the trade of a money-lender, then the Act must be complied with," but he held that the man's other vocation was a mere disguise.

The direct authorities lay stress upon the subsidiary character of the banking business, and, bearing in mind concerns which have combined banking with one other business in pretty equal parts, which were yet universally recognised as banks, it would probably be going too far to exclude such undertakings, if any exist, from the category of bankers.

The making a return under the Bank Charter Act, 1844, s. 21, or the alternative provisions of sect. 26 of the Companies Act, 1908, cannot constitute that a bank which is not so in itself.

Such return is a formality imposed on banks; the

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unwarranted and spontaneous making it is a mere assumption which can confer no legal rights.

Nor is it possible that a company can effectively arrogate to itself a specific legal character and exclusive attributes and privileges by including the business of banking, with other functions, in its memorandum and articles of association, or by obtaining a certificate of registration, conclusive as the latter may be for many purposes.

There remains the consideration whether the words quoted from sect. 2 of the Bills of Exchange Act can be read as enlarging the legitimate meaning of "banker."

The section is a purely and avowedly interpretation one; in its various clauses it uses with discrimination the words "means" and "includes." Here it says "includes." Its primary object obviously is not only to ensure that the singular shall include the plural, but also to embrace, not only partnerships of individual bankers, but also banking corporations or companies incorporated by Act of Parliament, Charter, or under the Companies Acts.

"Include" does not denote extension to the included subjects of attributes not pertaining to that wherein they are included.

Rather is the contrary the case. Things included, even in the most general terms, are subject to restrictions incidental to that wherein they are included. Cf. Maxwell on the Interpretation of Statutes, chap. 37, and cases there cited.

The opposite construction would seem to involve the curious result that an individual who was not strictly a banker would not be within the Act, while if he took to himself a partner or partners of precisely similar character, the firm would be.

In the Crossed Cheques Act, 1876, the wording was :

“Banker includes persons or corporations acting as bankers.”

The words used in sect. 2, “carrying on the business of banking,” seem to import a narrower meaning. It would be an unwarranted paraphrase to read this as “the business of banking among other businesses.”

The above authorities and arguments seem fairly conclusive.

Wherever, therefore, in the following pages, a banker is referred to in any proposition put forward by the author, the word is to be taken in the sense above attributed to it.

CHAPTER II

THE CUSTOMER

Sect. 1.—What constitutes a Customer

No less important is the question correlative to the above, namely, “ Who is a customer ? ” The relation of banker and customer is the foundation of the whole doctrine of mandant and mandatory in this connection, a doctrine of vital concern to both parties in view of the mutual duties, liabilities, and privileges it involves, a doctrine now happily rescued from long and undeserved obloquy and disregard by the judgment of the House of Lords in *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777.

On the decisions of the House of Lords in the *Gordon Case*, [1903] A. C. 240, and of Bailhache, J., in *Ross v. London County and Westminster Bank*, [1919] 1 K. B. 678, with respect to bankers’ drafts, hereinafter dealt with, it is conceivable that a cheque is not necessarily drawn by a customer, strange as the proposition may appear. Anyway, it is difficult to see how such a document could be “ paid in the ordinary course of business ” within sect. 60, unless drawn by a customer.

In the collection of cheques, a function fraught with many dangers to the banker, his sole protection is when they are crossed and he receives payment of them, as rigidly prescribed by sect. 82, “ for a customer.”

So again, the banker’s lien is dependent upon the relative position of the parties being that of banker and customer. The Bills of Exchange Act makes no attempt to define a customer.

The decisions on the point are conflicting to a bewildering degree.

The original and, it is submitted, the sounder view is that, to constitute a "customer," there must be some recognisable course or habit of dealing in the nature of regular banking business; that an isolated transaction or a series of transactions not commonly associated with banking is not sufficient.

That the element of use and habit is involved is distinctly shown by *Matthews v. Williams Brown & Co.*, 10 Times L. R. 386, and *Great Western Ry. Co. v. London and County Bank*, [1901] A. C. 414. In *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148, Collins, J., said: "I cannot see any dividing line between a person who has an (*sic* in report, but must be "no") account and any one who chooses to come with a cheque and ask the bank to collect it for him." And he refers to *Matthews v. Williams Brown & Co.* as "a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section (82)."

Of course, it is the banker, not the customer, who really benefits by sect. 82, but that does not affect the question.

A deposit account qualifies a man as a customer apart from any current account. (*Per* Lord Davey, *Great Western Ry. Co. v. London and County Bank*, [1901] A. C., at p. 421.)

That persistence in a course of dealing, not distinctly related to banking business, is not sufficient is shown by *Great Western Ry. Co. v. London and County Bank*, *ubi sup.* There a man had been for some years in the habit of getting crossed cheques exchanged for cash at a bank where he had no account, and which charged him nothing for the accommodation. Held, by the House of Lords, reversing the judgment of the Court of Appeal, that he was not a customer.

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It is difficult to reconcile the idea of a single transaction with that of a customer. The word surely predicates, even grammatically, some minimum of custom, antithetic to an isolated act. It is believed that tradesmen differentiate between a customer and a casual purchaser.

In *Tate v. Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376, Darling, J., said of a man paying the first cheque into an account which continued for nearly two months afterwards: "He was not a customer at the moment, but he was going to become a customer if that cheque was collected."

Nevertheless, in *Commissioners of Taxation v. English, Scottish and Australian Bank*, [1920] A. C. 688, decided by the Judicial Committee of the Privy Council in 1920 on a Colonial enactment corresponding verbatim with sect. 82, a man was held a "customer" whose only connection with the bank at the material date was the payment in of a single cheque for collection; a typical case of a first transaction.

The material portion of the judgment is as follows: "Their Lordships are of opinion that the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of this section, irrespective of whether his connection is of long or short standing. The contrast is not between an habitu   and a new comer, but between a person for whom the bank performs a casual service, e.g., cashing a cheque for a person introduced by one of their customers and a person who has an account of his own at the bank." (P. 688.)

The same line was taken by Bailhache, J., in *Ladbroke v. Todd*, 19 Com. Cases, 256. There the man was told by

the bank that he could not draw against the cheque until cleared, but the judge said, "it is not necessary he should have drawn on any money or even that he should be in a position to draw any money."

In this diversity of opinion, the matter appears to be still open to further discussion and final decision. That decision would most likely be found to lie between the two extreme views, taking the line that this is not really a legal question but one to be solved by what an ordinary intelligent business man would understand by "a bank's customer."

Such a test would probably rule out the indispensability of a current account and reject the theory of the first transaction, and establish some practical criterion based on course of dealing of reasonable duration, definitely of the nature of ordinary banking business, and to the mutual benefit of both parties.

The last qualification seems material. A bank is not a purely philanthropic institution. It is true that banks perform gratuitously for their customers many useful functions for which those customers would otherwise have to pay elsewhere. But it is the business relation, the facilities for depositing monies, the convenience of the cheque book on the one hand; the beneficial use of the money deposited on the other hand, which is at the root of the conception of a customer. This was recognised in *Great Western Ry. Co. v. London and County Bank*, [1901] A. C. 414, though Lord Brampton was inclined to hold any pecuniary interest immaterial. If a man obtained from a bank an agreed overdraft, never paying in, but giving good security and paying interest and drawing cheques on the account, he would presumably, after operating on the account, become a customer. So possibly a continued practice of getting bills discounted by a bank.

If a man is not otherwise a customer, such expedients

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as making him draw a counter-cheque for the amount, or entering the transaction under some such heading as "Sundry customers," will be of no avail. (Cf. *Matthews v. Williams Brown & Co.*, 10 Times L. R. 386; *Great Western Ry. Co. v. London and County Bank*, [1901] A. C. 414, at p. 425.)

A man is none the less a customer because he is overdrawn. *Clarke v. London and County Bank*, [1897] 1 Q. B. 552.

Sect. 2.—*Special Customers**Impersonal Customers*

Attempts have sometimes been made to foist off on bankers a sort of impersonal customer to whom the banker is supposed to look for payment of overdrafts.

The committee or board of management of a fund raised to meet some national or local emergency, of a charitable or scientific institution or a proposed exhibition, open an account, and cheques are drawn on it by authorised members of the committee or board, usually countersigned by the secretary. In the case of a mere fund there can be, and in the other cases there may be, no corporate body or legal entity; the committee or board are only administering certain monies coming to their hands. There is no particular danger so long as the account continues in credit. But such accounts have a tendency to become overdrawn, and it then behoves the banker to see that he obtains and retains the personal liability of those who draw the cheques, and that they are persons of financial responsibility. If the account be opened and headed in the name of the fund or undertaking, if the cheques bear its name, and if the signatures purport to be on its behalf, or in a form indicating that the signatories act as mere scribes, it might be alleged with some plausibility that the banker honoured

the cheques and advanced the money in reliance on and looking to the monies accruing to the undertaking or institution, and not on the personal responsibility of the drawers. The doctrine of *Kelner v. Baxter*, L. R. 2 C. P. 174, that a person who contracts on behalf of a non-existent principal is himself liable, or of *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360, that a procuration signature imports a warranty of an existing principal and authority from him to sign, would be of doubtful application in such a case, and it is far better to avoid all questions by a definite understanding at the outset. Institutions such as those above referred to sometimes become incorporated, either by royal charter, or else under the Companies Acts, omitting the word "limited" by leave of the Board of Trade. Opportunity may be taken of this to assert a transference of liability from the individuals to the new corporation by way of novation, as was attempted in *Coutts & Co. v. The Irish Exhibition in London*, 7 T. L. R. 313. The banker may, if he chooses, accept such a corporation as his debtor for past or future advances, or as his customer in the first instance; in any case he should bear in mind that members of a corporation cannot be personally sued for its debts, that their liability arises only on a winding-up and is then limited by the terms of the incorporating instrument, that a royal charter rarely imposes any liability whatever on members, and that the Board of Trade minimum for the liability of members of a non-trading society is practically a nominal figure.

Non-trading Corporations

Sir Mackenzie Chalmers has raised a question whether a non-trading corporation can in the absence of authority expressed in, or directly deducible from, its incorporating instrument, issue valid cheques. (Bills of Exchange, 8th

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edit., p. 72.) It can hardly be suggested that a railway or gas company, both of which are technically non-trading, is constrained to pay all its outgoings in bank notes or cash. *Serrell v. Derbyshire, etc. Ry. Co.*, 9 C. B. 811, and *Bateman v. Mid-Wales Ry. Co.*, L. R. 1 C. P., at p. 506, seem to recognise a distinction between bills and cheques in this respect.

It is submitted that the power to issue cheques for ordinary payments is impliedly inherent in all corporations.

Overdraft is borrowing, and so stands on a different footing, being dependent on the borrowing powers of the corporation.

Married Women

Married women can open current accounts, and all monies standing to such account in the married woman's own name are deemed separate estate, so as to entitle her to deal with them. (Married Women's Property Act, 1882, ss. 6 and 8.) As a married woman has power to contract with regard to her separate property, she can to the same extent draw bills and cheques. (Bills of Exchange Act, 1882, s. 22.) Overdrafts or other obligations incurred by a married woman would, however, be only recoverable against her separate property free from restraint on anticipation.

Change of
ownership.

There are obvious circumstances which may supervene and affect the property in and right to monies on current account, whether regarded as actual money or as a debt due from the banker. On the death of an individual customer the title vests in his personal representatives, and on production of probate or letters of administration they are entitled to draw upon or otherwise deal with the account. (*Tarn v. Commercial Banking Company of Sydney*, 12 Q. B. D. 294.) In ordinary joint accounts, and in the absence of provision to the contrary, all those in whose names the account stands must combine

Joint
accounts.

in drawing or authorise one or more of their number to do so. (*Husband v. Davis*, 10 C. B. 645, at p. 650 ; *Marshal v. Crutwell*, L. R. 20 Eq. 328.) On the death of a joint holder the survivor or survivors is or are in ordinary cases entitled to the whole amount, either under the law of devolution between joint owners or by custom of bankers and implied agreement. A distinction must, however, be drawn in the case of joint account in the names of husband and wife, where there is authority to the wife to draw. Then it becomes a question of intention: whether the method of keeping and working the account was for the sake of convenience or for the purpose of providing for the wife in case she was the survivor. As to the differing conclusions arrived at on this basis, see *Marshal v. Crutwell*, *ubi sup.*; *Williams v. Davis*, 33 L. J. P. 127; *Hall v. Hall*, [1911] 1 Ch. 487.

Partners

In partnership accounts one partner has a *primâ facie* right to draw in the firm's name, and authority to stop a cheque so drawn by another partner. (*Grant v. Taylor*, 2 Hare, 413.) In a case before the Partnership Act, 1890 (*Backhouse v. Charlton*, 8 Ch. D. 444), Malins, V.C., laid down that a surviving partner was entitled to draw generally on the account. The Partnership Act, 1890, s. 33, provides that, in the absence of agreement to the contrary, the death of any one partner works a dissolution of the partnership, though the surviving partners have power to bind the firm and continue business so far as is necessary for winding up its affairs. (*Ib.* sect. 38; cf. *Dickson v. National Bank of Scotland*, [1917] 54 Scottish Law Reporter, 449.)

The banker therefore is only safe in dealing with the surviving partners to such an extent as is clearly within this purpose. (*In re Bourne*, [1906] 2 Ch. 427.) The bankruptcy of one partner dissolves the firm, and

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the bankrupt partner has thereafter no authority to bind it. (Partnership Act, 1890, ss. 33, 38.) A bank has no lien on a partner's private account for an overdraft on partnership account. (*Watts v. Christie*, 11 Beav. 546.)

Executors and Trustees

Executors.

Executors in law constitute only one personality. In the absence of express provision, any one executor can operate on an executorship account, and the death or resignation of one does not necessitate any modification of the course of business.

Trustees.

Trustees probably stand on a different footing. There is no legal doctrine with regard to them that they constitute but one entity, for which each is entitled to act. Strictly speaking, therefore, they should all concur in any dealing with an account described as or known to be a trust account, even in drawing cheques thereon. It is, however, not unusual to accept a written authority from the whole body authorising certain members or a certain proportion to sign cheques, which shall be a good discharge to the banker. It is true that in ordinary cases one of several joint creditors can receive payment and give a good discharge. In *Husband v. Davis*, *ubi sup.*, the Court said, "The case of bankers stands upon special grounds. When trustees or others have a joint account with them as bankers, it is usual to require the authority of the whole to pay the money." That is somewhat ambiguous; it might mean either that trustees should all join in drawing or that they might jointly authorise one or more of their number to draw.

But it should be remembered that the appointment of several trustees is for the express purpose of insuring that the property shall be under their combined control; delegation of his powers is not permitted to a trustee (see *Flower v. Metropolitan Board of Works*, 27 C. D. 592),

especially when such delegation involves exclusive dealing with the property. The banker's wiser course therefore appears that recommended by the Institute of Bankers (Questions on Banking Practice, 7th edit., Question 1274), namely, not to accept or act on such an authority. Exception might, however, be made in case of absolute necessity, such as compulsory absence or incapacity of one or more of the trustees. Or if the instrument creating the trust specially authorises the signing of cheques by specified members or a certain proportion of the body of trustees, this, of course, is sufficient. But where an account is opened in the names of certain specified persons, even if the bank have notice or knowledge that it is a trust account, it is not incumbent on the bank to go behind the account or to raise any question whether there are other trustees, or as to the capacity of the actual customers to deal with the account.

On the death or retirement of a trustee, it is not safe for the banker to assume that the whole power to deal with the property necessarily devolves upon the surviving or continuing trustees. Under the Trustee Act, 1893, s. 22, the presumption is that it does, but that section says, "unless the contrary is expressed in the instrument, if any, constituting the trust," and the provisions of the Act apply only to trusts constituted or coming into operation after December 31, 1881. It may be necessary for such trustees to bring up the number to a particular figure, and the instrument creating the trust should be consulted with a view to ascertaining how this stands.

Joint Stock Companies

Anyone dealing with a Joint Stock Company is assumed to be cognisant of its constitution and powers as defined by its memorandum and articles of association. When a company propose to open an account,

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the banker should therefore satisfy himself with regard to all material particulars.

Sect. 77 of the Companies (Consolidation) Act, 1908, provides that "a bill of exchange or promissory note shall be deemed to have been made, accepted or indorsed on behalf of a company if made, accepted or indorsed in the name of or by or on behalf of or on account of the company by any person acting under its authority."

It is incumbent on the banker to ascertain, so far as possible, from public documents, how the company are to ascertain these powers, but he is not bound to go into matters of internal regulation. (*Premier Bank v. Carlton*, [1909] 1 K. B. 106.)

If the bank receive instructions from the company as to the form in which cheques will be drawn, they can, so long as they conform to such instructions, debit the company with such cheques, although the persons drawing them and not the company might be liable to third parties thereon. (Cf. *Mahony v. East Holyford Mining Co.*, L. R. 7 H. of L. 869, 889.)

Voluntary Winding-up.

In case of a voluntary winding-up of the company all the powers of the directors cease from the commencement of the winding-up, that is, from the passing of the second or confirmatory resolution, save in so far as the company in general meeting or the liquidators may sanction the continuance. (Companies (Consolidation) Act, 1908, s. 186.)

From that date, therefore, a cheque drawn by the directors is not the cheque of the company. (Cf. *Bolognesi's Case*, L. R. 5 Ch. 567.)

On this basis the banker could not debit the company with cheques subsequently paid.

Treating the banker, however, as the agent of the

company, it is arguable that his authority and duty to pay cheques drawn in the appointed form are not determined until he receives notice of the second resolution by advertisement in the *London Gazette*, under sect. 185 of the Companies (Consolidation) Act, 1908, and that he would be allowed all cheques paid prior to that date. (Cf. *In re Oriental Bank Corporation*, 28 C. D. 634, at p. 640.)

Compulsory Winding-up

Where a compulsory winding-up order follows the petition it relates back to the date of the presentation of the petition. (Companies (Consolidation) Act, 1908, s. 139. Cf. *Mersey Steel, &c., Co. v. Naylor, Benzon & Co.*, 9 A. C., at p. 440.) The powers of the directors cease on winding-up order (*Gosling v. Gaskell*, [1897] A. C., at p. 588), and the reference back imports the rule in *Bolognesi's Case* (L. R. 5 Ch. 567) and makes cheques drawn by the directors after petition not the cheques of the company. (Cf. Gore Browne, *Handbook of Joint Stock Companies*, 28th edit., at p. 379.) Such cheques do not therefore authorise the banker to part with the property of the company, and no such payment would be valid unless confirmed by the Court, which confirmation would in all probability be refused.

Local Authorities

The constitution, powers and limitations of the variety of Local Government Authorities make up one of the most voluminous and complicated special branches of the law, with which it would be impossible to deal here. As they dispose of large funds they are desirable customers; but the banker approached by such a corporation with a view to business must satisfy himself as to the authorised method of dealing with those funds,

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by whom cheques are to be drawn and all other pertinent matters. The method of appointing a bank official as treasurer has its advantages, but involves peculiarities in the drawing on the account.

Formerly, there was great danger in allowing overdrafts to Local Authorities, as their borrowing powers, even where they existed, were circumscribed and obscure. For an example, see *R. v. Locke*, 27 Times L. R. 148.

To a certain extent this position has been ameliorated by the Local Authorities (Financial Provisions) Act, 1921, which gives Local Authorities, with the consent of the Minister of Health, power to borrow by way of temporary loan or overdraft from any bank or otherwise for the purpose of providing temporarily for any current expenses that may be incurred by them in the execution or performance of any of their powers and duties, and charge the same on the whole of the funds, rates and revenues of the Local Authority. But the words "temporarily" and "current expenses" point to limitations of the borrowing power which a bank could not disregard.

CHAPTER III

CURRENT ACCOUNT WITH A MINOR

THIS has been the subject of considerable discussion and calls for special treatment. Arguments against the possibility of opening or keeping a current account with an infant have been based on :—

1. The alleged incapacity of an infant to give an effective discharge for a debt.
2. The alleged incapacity of an infant to draw a valid cheque.

Such arguments are, it is conceived, based on fallacies.

“ The disability of infancy goes no further than is necessary for the protection of the infant.” (*Per Pearson, J., in Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D., at p. 424.)

No doubt an infant cannot give an effective discharge for an unperformed obligation ; he cannot, even by deed, release an unpaid debt. But where the discharge is merely the recognition of the performance of the obligation, such as a receipt, there is no rational ground for importing the disability.

The case usually quoted in support of the proposition that an infant cannot give a valid discharge, *Ledward v. Hassells*, 2 K. & J. 370, possessed exceptional features, turning as it did on the express words of a will, which made the payment of a legacy to an infant conditional on his ability to give a valid discharge, so that, in a sense, such discharge would have had to be given (if at all) for a legacy as yet unpaid.

The capacity of an infant to give a discharge for

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fulfilled obligations in ordinary cases appears to be recognised by James, L.J., in *In re Brocklebank*, 6 Ch. D. 358, where he said: "Cannot an infant give a receipt for wages or any salary due to him in respect of his personal labour?"

Moreover, it is difficult to see how the question is of practical importance. The only circumstances in which the efficacy of a discharge could be material would be if the infant were trying to recover from the banker money already paid to him or on his cheques; and such a claim is absolutely untenable.

As to the
alleged
incapacity
of an infant
to draw a
valid cheque.

The Bills of Exchange Act, 1882, s. 22, sub-s. 1, distinctly limits the infant's incapacity to the assumption of liability. Sub-sect. 2 of the same section enacts that where a bill is drawn or indorsed by an infant the drawing or indorsement entitles the holder to receive payment of the bill and enforce it against any party thereto; that is, any party other than the infant.

A cheque is a bill of exchange drawn on a banker payable on demand. (Bills of Exchange Act, 1882, s. 73.) It is difficult, therefore, to see why a cheque drawn by an infant does not possess all the characteristics of a cheque drawn by a person of full age, save in so far as relates to the liability thereon of the drawer.

Another argument against keeping an account with a minor has been formulated as follows:—

To constitute a cheque or to entitle the banker to the protection of sect. 60 in respect of a cheque drawn on him, the relation of banker and customer must exist. That relation has been held to subsist although the banker has, by reason of overdraft, become the creditor instead of the debtor. (*Hardy v. Veasey*, L. R. 3 Ex. 107; *Clarke v. London and County Bank*, [1897] 1 Q. B. 552.)

Therefore the complete relation cannot exist where the customer could never be a debtor.

Therefore a banker paying a cheque drawn on him by an infant is not entitled to the same protection against forged indorsement or under the crossed cheques sections as he would be in the case of an ordinary cheque.

Such an argument would, however, infallibly be rejected by a court as fantastic and far-fetched.

The primary and natural relation of banker and customer, as contemplated in all the leading cases, is that the banker is debtor, the customer creditor. Where these conditions exist, as they perfectly well may in the case of an infant customer, it is irrelevant to import non-existent and supposititious circumstances as having any bearing on the position. Cf. *Nottingham Permanent Benefit Building Society v. Thurstan*, [1903] A. C. 6, where it was said an infant might perfectly well be a member of a building society though incapacitated from borrowing like the adult members.

Moreover, as will be hereafter pointed out (Cheques, p. 112, *post*), the Act does not specifically require that a cheque be drawn by a customer; and the inference that it must be is considerably weakened by the judgment in *London City and Midland Bank v. Gordon*, [1903] A. C. 240.

Another suggested danger is that the minor, after drawing out the whole of his current account, might, either before or on attaining majority, claim the money over again from the banker, on the ground of his own inability to give a valid discharge during infancy. Persons advancing this view have adduced in support the special provisions of Savings Banks and other Acts, constituting an infant's receipt a discharge for his deposit.

Infant re-
claiming
money paid.

This suggested danger is purely imaginary. Whatever may be the law where it is sought to enforce a contract against an infant or make him pay for goods purchased or repay money lent, when the positions are

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"If an infant was to buy a thing, not being necessities, he could not be compelled to pay for it, but having done so, he could not recover back the money." (*Per* Lord Kenyon, in *Wilson v. Krause*, 2 Peake, 196.) "If an infant receives rents, he cannot demand them again when of age." (*Per* Lord Mansfield, in *Earl of Buckinghamshire v. Drury*, 2 Eden, at p. 72.) *Valentini v. Canali*, 24 Q. B. D. 166, is a strong authority to the same effect. Cf. *Hamilton v. Vaughan Sherrin Co.*, [1894] 3 Ch. 589. The whole law as to infants' contracts and liabilities is exhaustively reviewed by the Court of Appeal in *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607, where it was held that money lent to an infant could not be recovered from him although the loan was obtained by his false representation that he was of full age.

The cases of *Hedgley v. Holt*, 4 C. & P. 104, and *Rawley v. Rawley*, 1 Q. B. D. 460, which at first sight might seem to justify the opposite view, are, as shown by the latter, explainable by the fact that they were cases of set-off, that the obligation set up against the infant was prior to and wholly independent of the obligation sought to be enforced by him, and that the technical rule requiring a set-off to be a recoverable debt precluded the court from entertaining as such the claim set up against the infant.

With regard to money paid on the cheques of the infant, there are in addition the provisions of sect. 22, sub-sect. 2 of the Bills of Exchange Act, before referred to: they expressly affirm the right of the holder of a bill drawn by an infant to receive the money for it.

This absolutely involves the discharge of the drawee from his obligation to the drawer in respect of an equivalent amount of the funds in his hands against which the bill is drawn.

The provisions in the Savings Banks and other Acts as to discharges by minors must be regarded as inserted to meet exceptional cases or *ex majore cautela*. If the account has been opened by a father or guardian paying in money to be drawn on by the infant, the banker can incur no risk by applying the money according to directions, any more than does a trustee in paying money to an infant by way of allowance under the terms of a trust.

Overdrafts are money lent (*Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society*, 9 A. C. 857 ; *Cuthbert v. Roberts, Lubbock & Co.*, [1909] 2 Ch. 226), and, as such, could never be recovered against an infant customer. Any security given by an infant for such overdraft would be void. (*Nottingham Permanent Benefit Building Society v. Thurstan*, [1903] A. C. 6.)

But a guarantor for an infant's overdraft would be held liable, either as such guarantor or as being, in substance, the principal debtor. (*Wauthier v. Wilson*, 28 Times L. R. 239.)

CHAPTER IV

RELATION OF BANKER AND CUSTOMER

Up to a very recent date, the universal formula for the relation of banker and customer was based on *Foley v. Hill*, 2 H. of L. Cases, 28, and defined it as that of debtor and creditor with the superadded obligation of honouring the customer's cheques when there was a sufficient and available credit balance. If the proposition was amplified, it stated the debt due from the banker to be repayable on demand, but the inclusion of these words was not regarded as in any way affecting the situation. They were treated, and judicially recognised by Scrutton, J., in *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833, as being "meaningless," in the same sense as a promissory note payable "on demand" is enforceable without any previous request for payment. So also, in the same case, Pickford, L.J., says that "on demand" has no effect in the case of money lent (at p. 839).

Moreover, the view that the banker's debt was of this nature was justified by the opinion of Lord Lyndhurst, L.C., in the earlier stages of *Foley v. Hill* and by the judgments in *Pott v. Clegg*, 16 M. & W. 321, and *In re Tidd*, [1893] 3 Ch. 154, which recognised the banker's debt as subject to the Statute of Limitations, and so, indirectly, as being at all times immediately due and recoverable.

But all along it was common legal knowledge that there were debts which were really not payable except on demand, nor enforceable till after demand. The distinction is drawn in *Walton v. Mascall*, 13 M. & W. 452, at

p. 455. "It is quite clear that a request for the payment of a debt is quite immaterial unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to seek out the creditor and pay him when the debt is due."

The test is whether the parties have agreed that demand shall be a condition precedent to the existence of a present enforceable debt.

The judgment of the Court of Appeal in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, has completely altered the legal position, laying down the principle that the banker's debt is not repayable without previous demand; that previous demand is a condition precedent to its constituting a present enforceable debt.

In that case, a partnership having been dissolved by death on August 1st, 1914, the question arose whether the sum of £2,321 standing to the firm's credit on current account at that date, no demand of payment having been made, constituted, at that time, an immediately recoverable debt affording a cause of action to the firm for money lent or money had and received.

And the opinion of the Court, as enunciated by Bankes, L.J., was "We all think a demand is necessary."

Considered judgments were delivered to the same effect.

The cases to the contrary were explained away on the ground that this point was not directly in issue or necessarily involved in their decision. Admittedly this was so in the House of Lords, when deciding *Foley v. Hill*, the only question being the existence or non-existence of any fiduciary character in the banker with regard to money paid in by the customer. And it was pointed out that Lord Lyndhurst in the same case, though he was of opinion that the Statute of Limitations applied, used the words "he has contracted to repay to his principal when demanded." Then the following significant

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passage from the judgment of Brett, J., in *Schroeder v. Central Bank*, 34 L. T. N. S. 735, was cited :

“ This is not a case of the drawer going himself and demanding all the money in his banker's hands, and I am myself inclined to think that it might be put in this way : that there was no debt on which an action against the defendants could be founded until a sum was demanded, and that when this cheque was drawn there was no debt which could be assigned, and consequently there can be no debt owing by the defendants to the plaintiff.”

But the ruling motive of the judgments was, that if the doctrine of the immediately recoverable right was admitted, consequences would follow which were obviously not contemplated by either party and would render banking a non-business proposition. The latter consideration has been somewhat derided by earlier judges, but was allowed proper weight here. It was pointed out that, if the old theory were followed out to its logical conclusions, the banker would be entitled to tender the amount of his credit balance to the customer at any moment, anywhere, and then dishonour outstanding cheques, to the possible ruin of the customer ; a procedure utterly inconsistent with the series of decisions establishing the customer's right not to have his account summarily closed. On the other hand, the customer would be justified in demanding his money at any branch of the bank, irrespective of where his account was kept ; again a subversion of the established and legally recognised principles of banking.

It was clearly a case for application of the indubitable, but strenuously limited and sparingly employed, legal principle of reading into a contract terms and conditions which must inevitably have been in the contemplation of the parties and without which the contract would be commercially ineffectual.

Bankes, L.J., in taking this line, referred to *Macmillan's Case*, as illustrating how collateral obligations

could be superadded to the primary relation of banker and customer. This is, perhaps, not setting the question on its strongest basis. *Macmillan's Case* went solely on one of the twofold aspects of banking, the debtor and creditor element and the mandant and mandatory, involved in the issue of cheques. The obligation to take care in drawing the cheques there re-established was solely the direct outcome of the latter relation, by no means confined to banker and customer, and having no normal connection with debtor and creditor.

More artistic and convincing is the view taken by Atkin, L.J.

He rejects altogether the conception of the dual relation. He says the contract of banker and customer is one and indivisible. Applying the doctrine above referred to so liberally as almost to trench on the prohibited area of making a contract for the parties, he formulates the contract or relation entered into between the banker and the intending customer in terms of which it is difficult to eliminate or even criticise any item. This he does as follows, at p. 127 :

“ The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due, against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily

CHAP. IV.

a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine."

The Court held that the issue of a writ by the customer would be a sufficient demand without any previous request for payment.

This is somewhat anomalous, inasmuch as a writ presupposes an existing cause of action at the date of its issue. No customer is likely to adopt so unnecessary and unreasonable a procedure ; if he did, and the action proceeded, the Court would probably mark their disapproval of his conduct by making him pay the costs, or the bank could at once pay the money into Court and so reduce the costs to a negligible minimum.

The points on which this judgment really affects the banker are (1) as to the Statute of Limitations ; (2) as to garnishee proceedings served on the banker ; (3) as to assignments of the credit balance on current account or part thereof.

Statute of Limitations

(1) As to the Statute of Limitations. The statute does not begin to run until there is a debt actually due and recoverable. It follows, therefore, from the recent case, that in the case of a credit balance on current account, the statute does not begin to run against the customer until demand for payment has been made and not complied with.

Bankers are not in the habit of setting up the statute against any legitimate claim, and the only practical bearing of the decision in this respect would seem to be with regard to the much discussed and exaggerated subject of unclaimed balances.

The converse case of an overdraft by the customer is not within the purview of this decision, and it is in no way affected thereby. Overdraft, especially in strenuous times, is not an uncommon incident, but it could hardly be argued that, in ordinary circumstances, a prospective overdraft was so essentially present to the minds of the parties when the account was opened, or provision for it so vital to the business efficacy of the contract, that a Court would be justified in importing terms relative thereto into a contract otherwise complete. There is the authority of *Parr's Banking Co. v. Yates*, [1898] 2 Q. B. 460, that the statute runs from the date of each advance, even when the advances are guaranteed. That case is overruled, so far as the guarantor is concerned, by the judgment of the Court of Appeal in *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. But this does not touch the liability of a principal or non-guaranteed debtor. A course of business might well be established by which a banker who has acquiesced for a reasonable period in overdrafts to a certain amount would be precluded from withdrawing such accommodation and dishonouring cheques without notice (cf. *Cumming v. Shand*, 29 L. J. Ex. 129), but this does not necessarily preclude the operation of the statute. In the absence of some definite agreement as to demand or date of repayment, it is best to consider the statute as running from the date of each advance.

The point is, however, of minor practical importance. A banker is not likely to let an overdrawn account lie absolutely dormant for six years, even from the date of the earliest advance, without some payment on account or as interest, or some other acknowledgment sufficient to bar the statute; and the principle of appropriation of payments in would, in the vast majority of cases, operate to the same end.

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Garnishee Orders

(2) As to garnishee orders.

The service of a garnishee order nisi on the bank was held by the House of Lords in *Rogers v. Whiteley*, [1892] A. C. 118, to attach and bind the whole of the judgment debtor's balance on current account, irrespective of the amount of the judgment debt. The point, now decided, that the debt on current account was only due and repayable after previous demand, and that no demand had been made, was not raised or considered there. It has long been common practice to garnish current accounts.

And under this late judgment in *Joachimson v. Swiss Bank Corporation*, *ubi sup.*, that practice will presumably continue. The Court distinctly lay down that their judgment will not affect it, assigning as the reason that the service of the garnishee order nisi constitutes, by operation of law, a sufficient demand. Atkin, L.J., alone expressed any doubt in the matter, and he suggests that after service of the order nisi there is ample power to provide for a demand being made before an order for payment is made.

It must be confessed that this view is not easily reconciled with the substantive point in the judgment, namely, that demand is a condition precedent to the existence of an actual immediately recoverable debt. *Ex hypothesi*, there could not, at the time of issue and service of the garnishee order nisi, have been any demand on the banker.

Order 45, rule 1, the foundation of the garnishee procedure, only authorises the application for and issue of the order nisi where there is a debt owing or accruing due to the judgment debtor; the judgment creditor or his solicitor has to swear to the existence of such debt and the order nisi is limited in operation to such debt.

It has been generally understood that the interposition

of anything constituting an unfulfilled condition precedent debarred the obligation from being either a debt owing or one accruing due.

Thus, if the return of a deposit receipt or a membership book is made a condition of repayment or withdrawal of money, no debt arises until its return. (*In re Dillon*, per Cotton, L.J., 44 Ch. D., p. 76; *In re Tidd*, [1893] 3 Ch. 154.) If money in the hands of a friendly society is only repayable on specified notice and no such notice has been given, it has been held not subject to garnishee proceedings. (*Cowley v. Taylor, Ackers and others, garnishees*, 124 Law Times Journal, 569, per Ridley and Darling, JJ.) And the giving of notice was held as much a condition precedent, when stipulated for, as the return of the membership book or deposit receipt in *Atkinson v. Bradford Third Equitable*, 25 Q. B. D. 377.

Therefore an unfulfilled condition precedent is none the less a bar to garnishee proceedings because it lies with the judgment debtor to perform it or not as he wills. And on this basis there would seem to be no effective distinction between a condition precedent and a contingency.

The test of "a debt owing" is whether it is one for which the creditor could have immediately and effectually sued. (*Glegg v. Bromley*, [1912] 3 K. B. 477.) The definition of "debt accruing due" given by the Court of Appeal in *Webb v. Stenton*, 11 Q. B. D. 518, and adopted in many subsequent cases, is "debitum in praesenti solvendum in futuro." In *Tapp v. Jones*, L. R. 10 Q. B. 591, Lord Blackburn says, "the meaning of accruing debt is debitum in praesenti solvendum in futuro, but it goes no further, and it does not comprise anything which *may* be a debt, however probable, or however soon it may be a debt." Lindley, L.J., in *Webb v. Stenton*, *ubi sup.*, says, "An accruing debt is a debt not

Debts owing
and accruing
due.

CHAP. IV. yet actually payable, but a debt which is represented by an existing obligation." Lord Lindley's definition is possibly open to two constructions, but the words "not yet actually payable" and "an existing obligation" are more consistent with a debt which, though not immediately payable, is actively maturing, and will automatically become due and payable at a definite future date, like the acceptor's contract on a bill at three months. "Solvendum" has an imperative significance, implying external compulsion, while "accruing," which is, after all, the word actually used and governing, means in ordinary language that which is of its own mere motion approaching a person at a fixed point. (See the examples cited in *Jones v. Thompson*, 27 L. J. Q. B. 234.)

The case of *O'Driscoll v. Manchester Insurance Society*, [1915] 3 K. B. 499, quoted in support, in the *Joachimson Case*, of the wider interpretation of the term "Debitum in praesenti solvendum in futuro," is not convincing. In that case a panel doctor had earned fees. It is expressly stated that there was no contingency which could happen to deprive him of his right to payment on figures being finally adjusted, and that the insurance society was in funds to pay. Therefore in the ordinary course of affairs the doctor would have been paid a definitely ascertained sum at an automatically approaching date without any demand on his part. Garnishee proceedings were therefore appropriate. And in this very case, Bankes, L.J., lays down the following propositions :

"If a sum of money is payable on the happening of a contingency, there is no debt owing or accruing."

"He (the judgment creditor) is only entitled to stand in the shoes of the judgment debtor."

"If the order as expressed has the effect of expediting the date of payment, I think it is wrong."

In *Cowley v. Taylor, Ackers and others, garnishees*,

124 Law Times Journal, 569, the judgment creditor instituted garnishee proceedings against a friendly society of which the judgment debtor was a member, and in the funds of which he was interested. In order to withdraw funds from the society, the rules provided that members desiring to do so must give written notice of their intention. No such notice was given by the judgment debtor. Held by Ridley and Darling, JJ., that where notice was required to be given in order to obtain a sum of money by the person to whom it was due, such money was not recoverable by garnishee proceedings.

If contingency be the only valid objection to a "debt accruing due," this case shows that the exercise or non-exercise of a person's volition is a contingency.

The Court of Appeal in the *Joachimson Case*, having decided that there was no debt actually owing, must, in order to preserve the application of any garnishee proceedings, have come to the conclusion that the current account credit balance constitutes a debt accruing due, although no demand of payment has been made.

The Court hold that the "service of the garnishee order nisi is, by operation of law, a sufficient demand to satisfy any right the banker may have as between himself and his customer to a demand before payment of monies standing to the credit of a current account can be enforced." They accord to it the same effect as if the demand had been made by the judgment debtor customer himself prior to the garnishee order nisi being applied for; that is, the whole current account credit balance is attached and dealt with under the order.

Effect of
order nisi.

The line of reasoning seems to be: "Here is a debt accruing due, but the date at which it becomes absolutely due and payable must be fixed by demand; the law will, in the interest of the judgment creditor, take this matter of demand out of the hands of the judgment debtor and enforce it by the machinery of the garnishee procedure."

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It may be asked what else could be done where a demand is necessary to fix the actual date of payment of a debt accruing due, and circumstances preclude such demand being made by the creditor. The answer is that the difficulty could only arise if "accruing due" is to be extended to cover debts other than those "accruing due" in the strict sense, namely, at a fixed or determinable date.

In any case, the garnishee procedure does not seem intended or designed to be so used.

It is a summary process, only to be applied within its specified limits and subject to its specified conditions.

The case of *Cowley v. Taylor, Ackers and others, garnishees*, 124 Law Times Journal, 569, before referred to, decided that where notice was required before money paid into a friendly society could be reclaimed, and such notice had not been given by the member, garnishee proceedings against the society, founded on a judgment against the member, could not be maintained. This case seems much in point in the present instance, especially as the County Court Judge, whose judgment the Divisional Court held to be right, had decided on the ground that until the member gave notice of withdrawal of the amount due to him there was no debt due from the society to the judgment debtor which could be the subject of garnishee proceedings.

Whiteson v. Pill & Stenning, [1911] 2 K. B. 418, turned on the question whether the judgment debt still remained unsatisfied within the County Court rules, identical with Order 45, rule 1, the judgment having directed payment at a future date, before which garnishee proceedings were instituted; but remarks of the Court of Appeal indicate that the process, being a species of execution, should only be applied where the state of circumstances fully justifies its application. Vaughan Williams, L.J., said, "I think that garnishee proceedings are a species of execution and that a judgment creditor should not be allowed to take

Nature of
garnishee
procedure.

out a garnishee summons or get an order thereon under Order 45, rule 1, if the state of things is such that he cannot issue execution under the judgment."

And at p. 431 Kennedy, L.J., says, "It is no argument, I think, to say that upon the view contended for by the plaintiffs, the County Court Judge can find some way of working out the rule so as to do no injustice to the judgment debtor; the question is whether, under the terms of the rule, there is jurisdiction to allow these summonses to be issued."

To treat the order nisi as the equivalent of the prior demand is to substitute the judgment creditor for the judgment debtor and to make the former the customer and creditor of the bank.

"A garnishee order does not operate to transfer the debt and does not constitute the garnishor a creditor either in law or equity of the garnishee." (*Per* Lawrence, J., in *In re Steel Wing Company*, [1921] 1 Ch. 349.) So also, in *Norton v. Yates*, [1906] 1 K. B. 112, it was held that a garnishee order is not an assignment of the debt.

Even the order absolute does not make the judgment creditor a creditor of the garnishee, though he has power to give a receipt. (*In re Combined Weighing Co.*, 43 Ch. D. 99, C. A.)

The judgment creditor is, no doubt, frequently spoken of as standing in the shoes of the judgment debtor, as, for instance, by Moulton, L.J., in *Glegg v. Bromley*, [1912] 3 K. B. 477, at p. 484, but this is invariably applied in restriction, not extension of the rights of the former. In *O'Driscoll v. Manchester Insurance Society*, [1915] 3 K. B. 499, Bankes, L.J., as before quoted, speaks of the judgment creditor as *only* standing in the shoes of the judgment debtor.

Lastly, if the debt is not payable till after demand and no demand has been made, treating the order nisi as demand is expediting the date of payment, a result

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which, according to Bankes, L.J., shows that the process has been wrongly put in motion, and is inapplicable.

These considerations make it difficult to accept unhesitatingly the applicability of the garnishee procedure as enunciated in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.

However, it is, of course, a binding authority, and the banker must take it that when he receives a garnishee order nisi based on a judgment against a customer it binds the whole of that customer's credit balance on current account, as heretofore, albeit the banker has received no demand for payment from the customer.

An order emanating from a County Court has presumably the same effect as one issued by the High Court. (*Yates v. Terry*, [1901] 1 Q. B. 102.)

Service of the garnishee order nisi would seem to bind any amount credited as cash on uncleared cheques. (*Jones v. Coventry*, [1909] 2 K. B. 1041.)

The attached account cannot be operated on even by cheques issued before service of the order.

As against that account the banker therefore is bound to dishonour all cheques presented, and incurs no liability to his customer in so doing. (*Rogers v. Whiteley*, [1892] A. C. 118.)

Course to be
adopted.

Provided the customer is a substantial one, the best and usual course for a bank to pursue in such circumstances is to open a new account, to which cheques presented for payment should be debited and monies paid in credited. Such payments in are not affected by the garnishee order, inasmuch as the debt they constitute from the banker to the customer was not owing or accruing due on the date of the service of the order. (Cf. *Jones v. Coventry*, [1909] 2 K. B., pp. 1041-1043.) The bank should at once communicate with the customer, stating what has been done and asking for instructions, and should also appear in accordance with the order, paying into Court a sum

equivalent to the judgment debt if there is no question of trust money, set-off or the like. CHAP. IV.

If the banker has any lien on or set-off against the monies attached, which existed at the date of the service of the order, this should be represented to the Court, and would probably prevail against the garnishee order. (*Tapp v. Jones*, L. R. 10 Q. B. 591 ; *Stumore v. Campbell*, [1892] 1 Q. B. 314.)

It is the business of a judgment creditor who serves a garnishee order nisi on a bank to make it quite plain what is the account to be attached, and the bank are not bound to run the risk of attaching a particular account and dishonouring cheques pending the hearing of the summons in doubtful cases where there is a discrepancy of names or like ambiguity. (*Koch v. Mineral Ore Syndicate, London and South Western Bank, Garnishees*, Journal of the Institute of Bankers, vol. xxxi. 459.) Order must be clear.

Broadly speaking, a banker is not bound to look beyond the person in whose name the account stands, or recognise rights of any other person ; but it would be obviously improper that a man should be able to put his money out of reach of his creditors by merely banking it under an assumed name. It is obviously the duty of the banker not to lend himself to such subterfuge.

In *Koch v. Mineral Ore Syndicate, ubi sup.*, the bank, as a matter of courtesy, informed the judgment creditor's solicitors that they had no such account as was sought to be attached. They were asked to attach another account said to be that of the judgment debtor. They declined, and the order nisi was subsequently amended ; but the bank were allowed cheques paid on that account during the interval.

The courts have the power to go behind the ostensible ownership of an account, and would probably exercise it on cogent evidence that the name was really only a blind. (Cf. *Pollock v. Garle*, [1898] 1 Ch. 1.)

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It is, no doubt, a somewhat difficult position for the banker, but his wisest course seems to be to get in touch with the Court as soon as possible and obtain directions in the matter, when his interests will be safeguarded as in the case above referred to.

Assignment of Credit Balance

(3) As to assignment of credit balance of current account.

It has been generally held that the credit balance on current account is assignable as a debt under the Judicature Act, 1873, s. 25, sub-s. 6.

In *Walker v. Bradford Old Bank*, 12 Q. B. D. 516, the Court held that the ordinary relation of debtor and creditor existed between the customer and his banker, and consequently that there was an obligation on the banker's part to pay over on demand all monies then or thereafter standing to the customer's credit. That, therefore, there was an accruing debt arising out of contract which was assignable under the Judicature Act.

But in *Schroeder v. Central Bank*, 34 L. T. N. S. 735, approved in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, where it was contended that a cheque operated as an assignment of the amount of the credit balance it represented, Brett, L.J., held that there was no debt on which any action against the banker could be founded until a sum was demanded, and that, when the cheque was drawn, there was no debt which could be assigned, and consequently there could be no debt owing by the banker to the assignee. On this basis it might be argued that there can be no assignment of a current account, there being no assignable debt till after demand.

The Judicature Act, however, includes choses in action as well as debts, it entitles the assignee to enforce the rights transferred and applies to future debts. The assignee would be entitled, after notice, to bring an action

against the bank ; if, as laid down in the *Joachimson Case*, a writ is a sufficient demand, this would seem to solve any difficulty.

The assignment, if absolute and not by way of charge only, transfers all the assignor's rights to the assignee (see *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190), and it would be unreasonable if this did not include the right to demand payment if necessary.

If the service of a garnishee order by the judgment debtor without the consent and contrary to the interest of the customer is treated as equivalent to a demand by the latter, it would be curious if the customer's own act, voluntarily and legally performed, did not have the same effect, or transfer the right to demand payment to a person of his own selection.

Whether Part can be assigned

There are a series of cases in which the question has been raised whether under these powers of the Judicature Act a debt can be dealt with piecemeal by separate assignments to different persons.

These cases are summarised and reviewed by P. O. Lawrence, J., in *In re Steel Wing Company*, [1921] 1 Ch. 349. They are as follows, and disclose a considerable diversity of opinion :

In *Skipper v. Holloway*, [1910] 2 K. B. 630, Darling, J., held that part of a debt could be assigned under sect. 25, sub-sect. 6, of the Judicature Act, 1873. His judgment was reversed on the facts, but the Court of Appeal did not decide this question.

In *Forster v. Baker*, [1910] 2 K. B. 636, Bray, J., held that assignment of part of a debt was not within that sub-section.

In an Irish case, *Conlan v. Carlow County Council*. [1912] 2 Ir. R. 535, Gibson and Boyd, JJ., concurred in this view of Bray, J.

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In *Durham v. Robertson*, [1898] 1 Q. B. 765, and *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B., at p. 195, the point was raised in the Court of Appeal, but no decision given.

Lawrence, J., agrees with Bray, J., that part of a debt is not assignable under the Judicature Act, so as to transfer the legal right in the assigned part to the assignee. He holds, however, that such assignment operates in equity to transfer the part assigned and constitutes the assignee a creditor in equity of the debtor in respect of the part assigned. In such case the assignee cannot make an effective demand for payment, and the assignor must be joined in any action.

The same would seem to be the effect with regard to part of a current account, and the assignor would have to be a party to any demand or action for payment of the part unless the particular relation of mandant and mandatory furnishes the demand on the former's part, which seems possible.

As indicated in the summary by Atkin, L.J., in the *Joachimson Case*, hereinbefore quoted, there are other questions arising out of the relationship of banker and customer, which will be dealt with under the appropriate headings.

CHAPTER V

THE CURRENT ACCOUNT

IT has been necessary to deal, to a certain extent, with the current account in discussing the altered position brought about by the judgment in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, particularly with reference to the Statute of Limitations, garnishee orders and assignments, matters immediately affected thereby. There are many other aspects in which it must be considered ; it is, despite the many mutual duties engrafted on the relation of banker and customer since 1848, the date of *Foley v. Hill*, still the predominant element in dealings between the parties.

Sect. 1.—How Current Account is constituted

The current account is made up of monies paid in by the customer, of the proceeds of cheques and bills collected for him, of coupons collected, of interest and dividends paid direct to the banker by the customer's order, and from various other sources.

No distinction has, apparently, ever been drawn as to the status of monies from such different sources, when once they have found their way into the current account ; they are treated as one entire debt, as if actually paid in in coin or notes by the customer.

The majority of accounts consist almost entirely of monies thus received by the banker on account of the customer.

Technically, in such cases the banker's position is

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that of an agent, not a debtor ; the form of action would be money had and received, not debt. A claim for money had and received is invariably included in any action brought by the true owner against a banker who has collected a cheque for a customer having no title.

That means waiving the tort and treating the banker as the plaintiff's agent ; collection for a fully entitled customer cannot differ in principle.

It would produce endless confusion and no good result to try and differentiate such items, and another implied agreement between banker and customer must be presumed, to the effect that all monies coming to the banker's hands for the credit of current account are to be taken as lent to the banker as soon as received.

Sect. 2.—General Rule no Fiduciary Relation

It is this purely debtor and creditor position which excludes any element or suggestion of trusteeship or fiduciary relation in the banker with regard to current account, the real point settled in *Foley v. Hill*.

The banker is free to use and does use the money as his own, like any other borrower ; the customer has parted with all control over it, like any other lender, retaining only his right to repayment.

And as a consequence the banker is not as a general rule concerned to enquire into the sources whence his customer derived the money, or to pay heed to the claims of third parties seeking to reach it in his hands as being by right theirs. (Cf. *Bodenham v. Hoskyns*, 21 L. J. Eq. 864 ; *Thomson v. Clydesdale Bank*, [1893] A. C. 282, on the first point. *Calland v. Loyd*, 6 M. & W. 26 ; *Gray v. Johnston*, L. R. 3 H. of L. 1, on the second.)

On this ground Courts have refused to interfere by injunction to restrain the banker from parting with monies in his hands by honouring the customer's cheques,

though such monies were alleged to be the direct produce of a theft. (*Fontaine-Besson v. Parr's Bank*, 12 Times L. R. 121.) In that case the customer was not before the Court, but Kay, L.J., intimated that, in any event, the only injunction they could make was one restraining the customer from drawing, not the bank from paying cheques previously drawn.

As shown hereafter, later decisions go to show that where all parties are before the Court and fraud or mistake of fact is proved, the relation of banker and customer will not of itself preclude the enforcement of repayment. (See *post*, p. 49.)

The older doctrine was supplemented or even overshadowed by another, namely, that once money had reached the hands of a banker or broker, it was absolutely merged, not traceable, and so not recoverable from the banker or broker, whatever might be the claimant's rights against the customer.

And, in a modified form, the same idea reappears in the doctrine of the appropriation of payments, by which earlier payments out are attributed to earlier payments in, thus possibly wiping out the impugned items. (*Clayton's Case*, 1 Merivale, 572.)

It is obvious that these principles, if pushed to extremes, would work injustice.

The appropriation of payments system will, in its general bearing on the banker, be dealt with hereafter, but it may be noticed here that one of its injurious tendencies was neutralised in *In re Hallett's Estate*, 13 Ch. D. 698, by the adoption of the charitable legal fiction that where a trustee or other person in a fiduciary capacity has paid trust money into his own private account, there is a presumption that monies drawn out for his own use are drawn from his own rather than from the trust monies, thus leaving any balance available to answer the trust divisible according to the rule in

CHAP. V. *Clayton's Case*, if the monies of more than one person have been wrongfully so mixed with the private current account. (*In re Stanning*, [1895] 2 Ch. 433.)

There was also the prerogative of the Crown in following Crown monies into the hands of persons into whose hands they came. In its broadest aspect, as laid down by Lord Lyndhurst in *R. v. Wrangham*, 1 C. & J. 408, any such person becomes at once a debtor to the Crown in respect of such monies, whether he knew it to be Crown money or not; but the rule, at any rate as regards bankers, is probably confined to cases where the banker knew or ought to have known that the money was in fact Crown money. (*In re West London Commercial Bank*, 38 Ch. D. 364.) In such cases the banker might even be liable to replace money already drawn out by the customer, unless the customer was authorised to pass the money to his private account. (*In re West London Commercial Bank*, *ubi sup.*)

Sect. 3.—Following Money of Wrongdoer or Person in Fiduciary Capacity

But now the doctrine of following or tracing money has developed on much broader lines.

So long as money is traceable either in specie or in its proceeds or investment, equity, or common law administering equity, will follow and lay hold of it, under what is known as a tracing order, for the benefit of the person who has been defrauded of it, parted with it under mistake of fact, or is otherwise rightfully entitled to it.

This procedure enables relief to be given in many cases where the narrower form of action for money had and received would fail.

It is fully expounded by the House of Lords in *Sinclair v. Brougham*, [1914] A. C. 398.

Its operation is further exemplified and shown to affect money in the hands of a banker by *Banque Belge pour l'Etranger v. Hambrouck*, [1921] 1 K. B. 321. There a cheque had been obtained by fraud, the proceeds thereof subsequently transferred to a third person for no legal consideration, and by that person paid into a bank. The bank paid the money into Court, and the question was between the defrauded party and the transferee of the proceeds. And the Court of Appeal, adopting the line laid down in *Sinclair v. Brougham*, held that the transferee could have no better title to the money than the fraudulent transferor had. They said there was no immunity for bankers, and that, if traceable, the money could have been followed into the bank. *Hallett's Case* was treated as only coming into play where the money was not traceable, because merged by virtue of *Clayton's Case* and the relationship of banker and customer, a sort of additional chance for the rightful claimant.

It is not the duty or interest of a banker to decide between conflicting claims to money in his hands; the course adopted in the above case, of obtaining the protection of the Court and leaving the interested parties to fight the matter out, is obviously the wise one to pursue.

Where money is paid under a mistake of fact to the credit of a customer, the relation of banker and customer will not enable the banker to hold it against the person who paid it in, unless he received it as agent and has altered his position before he discovers or has notice of the mistake. (*Commissioners of the Admiralty v. National Provincial and Union Bank*, 38 Times L. R. 492.) Merely putting it to reduction of an overdraft is not a sufficient alteration of position; making further advances on the strength of it probably would be. (Cf. *Kleinwort v. Dunlop Rubber Co.*, 23 Times L. R. 696; *Kerrison v. Glyn, Mills & Co.*, 17 Com. Ca. 41.) Lien does not

Money paid
by mistake.

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apply. As *Bailhache, J.*, said in *Scottish Metropolitan Assurance Co. v. Samuel*, *The Times Newspaper*, July 22, 1922, lien only affects the customer's money, which money paid to his account by mistake of fact is not.

In the above-mentioned case of *Commissioners of the Admiralty v. National Provincial and Union Bank, Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, had been cited for the defendants, but Sargant, J., said: "The case of *Joachimson* has nothing to do with it. That only refers to the ordinary relation of banker and customer; the undertaking to honour cheques does not extend to amounts standing to the credit of current account if and so far as it was swollen by an inadvertent payment in mistake of fact."

In *Steam Saw Mills Co., Ltd. v. Baring Brothers & Co., Ltd.*, W. N., January 7, 1922, p. 7, where it was claimed that money had been paid into the bank under mistake of fact, the Court of Appeal held that the bank was entitled to keep the money in their hands, but must undertake not to part with it without notice to the plaintiffs and without an order of the Court, the application having been made in the absence of the party mainly interested.

There are other circumstances in which monies which have wrongfully found their way into the banker's hands may be reclaimed. There is money collected on cheques for a wrongful holder, dealt with hereafter under the head of "The Collecting Banker." There is the somewhat discrepant series of cases dealing with improper drawings on a trust account by which the banker has more or less directly profited.

Trust Accounts

It is sometimes asserted that bankers do not take trust accounts as such. That is not the case. It is not

a question of whether or no the account is opened under a heading distinctly describing it as a trust account.

Accounts headed, for distinguishing purposes, in terms not definitely indicating a trust, have been held proof that the banker was aware of the fiduciary nature of the account—for instance, *In re Kingston*, L. R. 6 Ch. 632, where “Police Account” was held to constitute an account so headed a trust account.

And, apart altogether from any question of heading, if the banker has notice, either from information or otherwise, that an account is affected with a trust, express or implied; that the customer is in possession or has control of the money in a fiduciary capacity, he must regard the account strictly in that light. Of course, where there is no such notice, the mere fact that, unknown to the banker, monies are held by the customer in a fiduciary capacity in no way affects the banker’s right to treat them as the absolute property of the customer. (*Thomson v. The Clydesdale Bank*, [1893] A. C. 282; *Union Bank of Australia v. Murray Aynsley*, [1898] A. C. 693; *Bank of New South Wales v. Goulburn Valley Butter Co.*, [1902] A. C. 543.) Nor is the mere fact that the person opening the account occupies a position which renders it probable that he has monies of other persons in his hands sufficient to put the banker on enquiry. (*Greenwood Teale v. Williams Brown & Co.*, 11 Times L. R. 56 (a solicitor); *Thomson v. Clydesdale Bank*, *ubi sup.* (a stockbroker).)

Where, however, the customer holds any such position, the fact may lend added significance to the heading under which the account is opened.

When once the banker is fixed with the fiduciary nature of the account he has to bear in mind two somewhat conflicting influences. He has to consider the interests of the persons beneficially entitled, indirectly involving his own, and he has to recognise the right of

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his customer to draw cheques on the account and have them honoured. This divided duty has led to complications. The banker obviously must not be a party or privy to any fraud on the beneficiaries, any misapplication of the trust fund. He could not, on the mere instruction of the customer, transfer trust funds to private account, to wipe out or reduce an overdraft. (Cf. *John v. Dodwell*, [1918] A. C. 568.)

It is with the cheque that difficulties arise.

It is not the business or right of a banker, to whom a cheque is presented, to set up the claim of any third person against the mandate of his customer; at the same time, he cannot shelter himself behind his character of banker to cover complicity in a fraud. (*Gray v. Johnston*, L. R. 3 H. of L. 1.) Mere suspicion does not justify the banker in refusing payment of a cheque. The suggestion made in *Ex parte Adair*, 24 L. T. 198, at p. 203, that a banker would be acting rightly in dishonouring a cheque drawn by a customer on a trust account because it was payable to a person known to be that customer's tailor, is exaggerated, and is not supported by *Ex parte Kingston*, L. R. 6 Ch. 632, which was the appeal from that decision. The same applies to some of the statements in *Jackson v. Bristol Bank*, 1 Times L. R. 522.

On the stricter lines now obtaining with regard to dealing with trust funds, it might well be that a banker would be held liable for parting with the money to a third person, even on a cheque, if the circumstances were such that he must have known it was a misapplication of the funds, albeit no personal benefit accrued to the banker.

Benefit to Banker

Cases have, however, arisen where the banker has occupied the dual capacity of drawee of a cheque on an

account known to be a trust account and at the same time payee of the cheque for his own benefit, as in reduction of an overdraft on the private account of the customer.

Decisions have somewhat varied as to the exact rule in such cases. In *Foxton v. Manchester and Liverpool District Banking Co.*, 44 L. T. N. S. 406, Fry, J., laid down that a bank could not retain the benefit of a cheque drawn on a trust fund known to be such and paid into an overdrawn private account. He said: "It appears to be plain that the bank could not derive the benefit which they did from that payment, knowing it to be drawn from a trust fund, unless they were prepared to show that the payment was a legitimate and proper one, having reference to the terms of the trust. It is said that they did not know what the trust was at that time. That appears to me to be immaterial, because those who know that a fund is a trust fund cannot take possession of that fund for their private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money."

Differing
views.

In *Coleman v. The Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, Byrne, J., carefully reviews this case in the light of *Gray v. Johnston*, L. R. 3 H. of L. 1. He quotes (see pp. 248-249) significant passages from that case, in which Lord Cairns and Lord Westbury distinctly imply that the banker is not to be held privy to the fraud merely because, in the ordinary course of business, the cheque was carried to the private account and diminished an overdraft which, if a balance had been struck, would have been found to exist; but that to deprive the banker of the benefit, it must be one "designed or stipulated for," as, for instance, where a balance has been struck and the customer pressed for payment or reduction of the ascertained overdraft on the private account. With regard to *Foxton's Case*, he

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says: "That was a case depending on the evidence. I need not go into all the circumstances, but there was a benefit designed for the bank, who had been calling on the parties having private accounts to reduce their overdrafts, and they did it with the intention of reducing their indebtedness." He then quotes the remarks of Fry, J., reproduced above, and continues (p. 253): "I am asked to say that that amounts to a decision to this effect: that wherever there is an account which upon the face of it is a trust account, and the customer draws a cheque upon that account and pays in the cheque to the credit of his private account, the bankers are bound to see and enquire (that is how I understand the proposition is put) that the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned judge in that case. If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further enquiry into the matter." But he held that the fact that in point of law the money must, in the case before him, be regarded as having been applied at the moment in reduction of an overdraft, did not render the bankers liable to refund it, although they knew the money was derived from some trust.

In *A.-G. v. De Winton*, [1906] 2 Ch. 106, Farwell, J., expressed approval of the view taken by Fry, J. There is, therefore, a predominance of opinion in favour of the stricter rule laid down by Fry, J.

And subsequent decisions, though not directly apposite on the facts, bring out strongly that tendency, before referred to, to look with very jealous eyes on any

dealing with trust funds whereby one of the parties to such dealing reaps a benefit.

In *John v. Dodwell*, [1918] A. C. 563, the respondents' manager was authorised to draw cheques upon their account for the purposes of the business. He bought shares through the appellants as brokers, and, in payment of the price, fraudulently gave cheques upon the respondents' account. The appellants received such cheques without fraud, but with knowledge that the manager, without apparent authority, was drawing for his own purposes upon the respondents' funds. The respondents were held entitled to recover the money as money held in trust for them, on the grounds, first, that on the face of them the cheques showed that the agent was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers, and that deprived the appellants of any right to hold them against the respondents; second, that the agent was in a fiduciary position, and any third person taking from the agent a transfer of the property, with knowledge of the breach committed by him in making the transfer, held what had been transferred under a transmitted fiduciary obligation to account for it to the principal.

In *British America Elevator Co. v. Bank of British North America*, [1919] A. C. 658, a bank agreed to furnish the company's agent with cash in exchange for drafts on the company. The cash, as the bank knew, was to be used in paying for grain to be purchased for the company by the agent. The bank, instead of giving cash for the drafts, credited them in whole or in part to the agent's private account, which was generally overdrawn. Held, by the Judicial Committee of the Privy Council, that the bank, having been party to a misapplication of trust funds, the company was entitled to judgment for the amount of the loss: in other words, that the bank,

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having knowingly been parties to a misapplication of trust funds, were liable to replace those funds.

It may be contended that neither of these cases was that of a banker faced with the problem of a cheque drawn on him and directed to be paid into private account. That is true, but one cannot help feeling that, in their light, a Court might very possibly regard the duty to honour such cheque, when destined for an overdrawn private account, as the duty of minor obligation. In the author's opinion, the course dictated by expediency, if by no higher motive, is for a banker scrupulously to abstain from being party or privy to any operation on an account known to be a trust account, involving benefit to the banker, even indirect and unasked for, through the medium of overdrawn private account or otherwise, and whether or no a cheque is concerned.

Sect. 4.—Combining Accounts

It is clear that knowledge of the fiduciary nature of an account, however acquired, will preclude the banker from himself utilising the account for his own benefit, as by combining it with the customer's private account or asserting a lien over it for the customer's personal liabilities.

When there is no question of fiduciary relation or trust account involved with regard to any of several accounts kept by a customer, the bank can combine them, unless by agreement, ear-marking, course of business or the like there is an obligation to keep them separate. Even then, the obligation is terminable by reasonable notice. (*In re European Bank*, L. R. 8 Ch., at p. 44; *Garnett v. McKewan*, L. R. 8 Ex. 10; *Buckingham v. London and Midland Bank*, 12 T. L. R. 70; *Union Bank of Australia v. Murray Aynsley*, [1898] A. C. 693.)

But such combination should always be exercised with due care for the customer's credit and interests,

the dishonour of outstanding cheques, in particular, being avoided if in any way possible.

In some circumstances the banker is bound to combine. Thus, where a bank has a loan account and also a current account in credit with the same customer, and holds security for the ultimate balance, it cannot appropriate the proceeds of the security to the loan account, ignoring the credit balance on the other, but must treat the two as one account. (*Mutton v. Peat*, [1900] 2 Ch. 79.)

The customer has not the corresponding right to combine accounts kept at different branches, so as to draw cheques indiscriminately. (*Woodland v. Fear*, 26 L. J. Q. B. 202; *Garnett v. M'Kewan*, L. R. 8 Ex. 10; *McNaghten v. Cox & Co.*, Times newspaper, May 11, 1921, where the two branches were in one building; and the summary of the obligations of banker and customer by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.)

Apart from combining, the bank is not entitled to close a customer's account without due notice. This is laid down by Atkin, L.J., in the summary of the mutual obligations above referred to. (See also *Buckingham v. London and Midland Bank*, 12 Times L. R. 70.) The banker must provide for outstanding cheques. It is not sufficient to request the customer to transfer his credit balance to another bank, and undertake to refer cheques to that bank, because that involves technical dishonour.

Sect. 5.—Effect of Bankruptcy of Customer

The position of the banker when his customer becomes bankrupt is, owing to defective legislation, partly dubious; where clear, unreasonably to the banker's prejudice. To begin with, the Bankruptcy Act, 1914, s. 38, defines as property divisible among the creditors all property

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belonging to or vested in the bankrupt at the commencement of the bankruptcy or acquired by or devolving on him before discharge. Property includes choses in action, and a current account, of course, is within this section. The banker must hand over to the trustee in bankruptcy all assets of the bankrupt held by him which he is not entitled to retain. No demand seems necessary, and if the banker does not do this, he becomes guilty of contempt of Court. (Sect. 48.)

As against this, the banker has the full right of satisfying any set-off, lien or other claim he may have against such assets, including the right to safeguard himself with regard to current bills discounted for the bankrupt or on which the bankrupt is liable as acceptor. (*Baker v. Lloyds Bank*, [1920] 2 K. B. 322.)

If matters stopped there the banker would have no just cause of complaint. But he has to reckon with the legislation as to relation back of the trustee's title, and see how far his ordinary transactions with the customer during the period covered by such relation back are validated by falling within the prescribed protected transactions.

Relation back

The commencement of the bankruptcy, on which the property of the bankrupt vests in the trustee, is not, as might be supposed, the adjudication in bankruptcy, or even the receiving order. It is an arbitrary point of time. By sect. 37 of the Bankruptcy Act, 1914, the bankruptcy relates back to the act of bankruptcy on which the receiving order is made against the bankrupt, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to the time of the first of such acts within three months before presentation of the petition.

It would seem that the commencement of the bankruptcy is to be fixed, not merely by the day, but at the actual moment when the act of bankruptcy was committed. (*In re Bumpus*, [1908] 2 K. B. 330.) The receiving order, on the other hand, is in law deemed to have been made on the first moment of the day of its date, so that it covers all payments made that day. (*In re Pollard*, [1903] 2 K. B. at p. 45.)

The cases in which the banker gets to know of either an act of bankruptcy on the part of, or a petition against, his customer are necessarily rare; under present-day conditions he is frequently kept in the dark as to a receiving order having been made until after he has, by paying the customer's cheques, incurred further liabilities to the trustee.

Indeed, notice of act of bankruptcy or petition is treated by the Act rather in the light of a bar to protection than as having any direct effect. For transactions after receiving order there is no protection whatever, except with regard to after-acquired property.

The provisions as to protected transactions are contained in sects. 45 and 46 of the Bankruptcy Act, 1914; in sect. 47 as to after-acquired property; and the trouble is that, except in the case of sect. 47, the wording seems almost designed to exclude the case of the banker paying to third persons cheques drawn by the bankrupt.

Under sect. 45 transactions to be protected must take place before receiving order, and the person concerned must not have at the time notice of any available act of bankruptcy.

Then come the class of dealings protected, the only ones possibly touching the position being payment or delivery to the bankrupt, and contract, dealing, or transaction by or with the bankrupt for valuable consideration.

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Paying
cheques of
bankrupt.

On the face of it, these words are eminently unfitted to cover the case of a banker paying away the bankrupt's money, on his cheques, to third persons.

That is not payment or delivery to the bankrupt, nor is it a contract, dealing, or transaction by or with him for valuable consideration. (Cf. *In re Clark*, [1894] 2 Q. B. 393; *In re Teale*, [1912] 2 K. B. 367; better reported, 19 Manson's Bankruptcy Rep. 327.)

But with regard to this sect. 45, the strongest argument that it does not cover the case is to be found in the special provision in sect. 47 (1) dealing with after-acquired property, which enacts that "*for the purposes of this sub-section any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.*"

By every canon of statute interpretation this is conclusive that such payment is not such a transaction for the purpose of any preceding section. "Shall be deemed" shows that the construction to be applied to sect. 47 is an unnatural and fictitious one, and implies that in any other connection such construction is unjustifiable.

Sect. 46 is apparently intended to cover somewhat broader ground than sect. 45. It provides that "payment of money or delivery of property to a person subsequently adjudicated bankrupt or to a person claiming by assignment from him shall, notwithstanding anything in this Act, be a good discharge if made before the actual date on which the receiving order is made and without notice of the presentation of bankruptcy petition, and is either pursuant to ordinary course of business or otherwise *bond fide*."

Here there is a concession. The protected period is enlarged. With regard to payments of money or delivery of goods, notice of an act of bankruptcy is not to count; a man might have notice of an available act of bank-

ruptcy but not of a petition having been presented, and if in the ordinary course of business or otherwise *bonâ fide* he paid money or delivered property to which the bankrupt was entitled, either to the bankrupt or his assignee, it would be a good discharge, despite the subsequent bankruptcy adjudication, and the trustee could not claim it again.

Sect. 46 is really inconsistent with sect. 45. Both sections deal with payment or delivery to a bankrupt, for a person subsequently adjudicated bankrupt is a bankrupt. Sect. 45 infers that such payment or delivery is bad if made with notice of an act of bankruptcy, sect. 46 that it is good. But sect. 46 says, "notwithstanding anything in this Act," so it overrides sect. 45, for it cannot be contended that notice of an act of bankruptcy makes the payment or delivery *malâ fide*. One cannot help suspecting that sect. 46 was introduced to meet some exceptional case, say that of bankers, who were notoriously agitating on the subject; that it somehow got made general and so inconsistent with sect. 45, and, incidentally, failed in its object.

For here again the language of sect. 46 is absolutely inappropriate to the case of a banker paying a cheque to a third party holder. Payment of a cheque to a third party payee or a subsequent holder is not payment to the drawer. And a cheque is not an assignment of money in the hands of the drawee, nor is the holder of such cheque an assignee of such money or entitled to claim it as such.

Williams on Bankruptcy, 12th edit., p. 309, says: "It would seem that the payee of a cheque drawn by the bankrupt is not within these latter words," and quotes *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank*, 34 L. T. N. S. 735.

But there can be no question about it. The Bills of Exchange Act, 1882, s. 53, says, "A bill of itself does

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not operate as an assignment of funds in the hands of the drawee available for the payment thereof"; sect. 73 says, "A cheque is a bill of exchange drawn on a banker payable on demand."

And the holder of a cheque has no claim whatever on the banker. His only claim, if the cheque is dishonoured, is against drawer and prior indorsers.

This view does not need any support from the language of sect. 47, otherwise it might be pointed out that when that section, for the purpose of saving the payment of a cheque on after-acquired funds, utilises sect. 45, it implies that sect. 46 is not available or applicable.

The position is inexplicable on any rational basis. It works out thus:

Result of the sections.

A man, having committed an act of bankruptcy and having a petition against him pending, draws a cheque payable to himself. He presents it to his bankers, who know of the act of bankruptcy but not of the petition. They pay him in the ordinary course of business. He is subsequently adjudicated bankrupt. They are protected under sect. 46, even if he draw out his full credit balance.

A man who has committed an available act of bankruptcy draws a cheque payable to a third party. Payee presents it to the banker, who has no notice of the act of bankruptcy. The banker pays it. A receiving order is subsequently made on that act of bankruptcy. The bank are liable to the trustee for the money paid out.

Where notice of an act of bankruptcy operates to exclude protection, such notice need not be express or precise. "When an act of bankruptcy has in fact been committed, any communication which brings to the knowledge of a person the alleged fact that an act of bankruptcy has been committed in any way which ought to induce him as a reasonable man to believe that the notification is true is sufficient notice." (Cf. *Hope v.*

Meek, 25 L. J. Ex. 11.) Notice of petition is constructive notice of the act of bankruptcy therein alleged (*Re Gershon and Levy*, [1915] 2 K. B. 527), unless, perhaps, the petition is dismissed. (*Per Lindley, L.J., in Re O'Shea's Settlement*, [1895] 1 Ch., at p. 332.)

After-acquired Property

Although the Bankruptcy Act, 1914, in general contemplates and provides for the vesting in the trustee of all property acquired by or devolving on the bankrupt prior to his discharge, a certain amount of latitude has always been allowed with regard to after-acquired property, and the rule, as formulated in *Cohen v. Mitchell*, 25 Q. B. D. 262, was, until 1914, adopted that, "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bond fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

SECT. 47, sub-sect. 1, of the Bankruptcy Act, 1914, based on this rule, enacts as follows: "All transactions by a bankrupt with any person dealing with him *bond fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication shall, if completed before the intervention of the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in that trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction." As before stated, it then puts payment by a banker of a cheque drawn by an undischarged bankrupt customer to the payee or holder out of after-acquired property on the footing of a protected transaction for value with the bankrupt himself. The payment of the bankrupt's cheque to a

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third party is unquestionably "a payment made by order or direction of the bankrupt by his banker," it being now firmly established by the judgment of the House of Lords in *London and County Bank v. Macmillan*, [1918] A. C. 777, that, so far as cheques are concerned, the relation of customer and banker is that of mandant and mandatory: he who orders and he who has to obey.

Conversely, with regard to after-acquired property, sect. 47 (1) provides that for the purposes of the sub-section the receipt of any money, security or negotiable instrument from or by the order or direction of the bankrupt by his banker shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value. This covers the opening of an account by the undischarged bankrupt and all payments in to such account of after-acquired property.

It will be noticed that the 1914 legislation cuts out the part of the *Cohen v. Mitchell* rule which validated the transaction whether the party dealing with the bankrupt knew of the adjudication or not. Is the effect still the same? It might fairly be argued that the omission of any such words as "without notice that he is such undischarged bankrupt," analogous to those relating to acts of bankruptcy in the preceding sections, implies that the rule holds good and that knowledge is immaterial. Williams on Bankruptcy, 12th edit., p. 245, submits that sect. 47 (1) has not altered the law laid down in *Cohen v. Mitchell*, though it omits "with or without knowledge of bankruptcy," quoting Swinfen Eady, M.R., in *Hosack v. Robins*, [1918] 2 Ch., at p. 345, where he says, "Sect. 47 of the Act of 1914 was, however, a statutory recognition and embodiment of the law previously laid down in *Cohen v. Mitchell*."

But the question is not of much practical importance to the banker: he is made the subject of special legislation.

Sect. 47 (2) enacts as follows: "When the banker has ascertained that a person having an account is an undischarged bankrupt, unless satisfied that the account is on behalf of some other person it shall be his duty to inform the trustee or the Board of Trade, and thereafter he shall not make any payment out of the account except under order of the Court or instructions from the trustee, unless by the expiration of one month from such notice he has received no instructions from the trustee."

The actual protection to the banker, therefore, is:

(1) When he does not know the customer to be an undischarged bankrupt and his only dealings with him or at his direction or order are in respect of after-acquired property.

(2) Where, having discovered the customer to be an undischarged bankrupt, he has given the requisite notice, suspended operations for a month, and then had no communication from the trustee. He can then begin again to deal with after-acquired property.

There is no suggestion how the banker is to recognise a new customer as an undischarged bankrupt of possibly a year's standing, or how he is to diagnose property as being after-acquired. The adoption of No. 2 does not cover previous transactions, which must stand or fall by the test of No. 1.

Looking at the unfortunate inference to be drawn from this special provision as to bankers in sect. 47 in its bearing on sects. 45 and 46, these provisions of the Act of 1914 seem calculated to do bankers more harm than good, while the after-acquired property scheme appears scarcely calculated to afford the undischarged bankrupt those banking facilities which are essential for his business rehabilitation.

A possible course would be for the bankrupt to open an account with a nominal amount of after-acquired property, informing the banker of his position. The

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banker would communicate with the trustee, and some arrangement might be come to, or, if the trustee remained quiescent for a month, operations might proceed on a larger scale.

If customer
demands
payment.

Prior to the Bankruptcy Act, 1914, when a banker was not safe in handing over property to a man whom he knew to have committed an available act of bankruptcy, he might be put in a difficult position by that man demanding and suing for payment of a credit balance on current account. It was laid down in *Macarthy v. Capital and Counties Bank*, [1911] 2 K. B. 1088, that if the customer proceeds to action, the bank could bring the money into court and thus secure protection and escape incurring costs. It is doubtful whether this procedure is available now.

A customer applies for payment out of his credit balance or presents a cheque payable to himself for the amount. The banker knows of an available act of bankruptcy, but has no notice of the presentation of any petition, and does not know of any receiving order. The banker says, "Under sect. 45 I cannot pay you, because I have notice of an available act of bankruptcy." The customer says, "Yes, but under sect. 46 you get a good discharge if you pay me because you have no notice of any petition and you do not allege there is a receiving order against me. So you must pay me." It is hardly open to the banker to reply that to pay the man his own money would, in the circumstances, be contrary to the ordinary course of business.

If the customer's view is the right one, the banker would seem to have no alternative but to pay, and no ground for asking the protection of the Court, though if it turned out that a receiving order had been made covering the time of payment, he would have to refund the money to the trustee.

So again with a secured debt. In *Ponsford v. Union*

and *Smiths Bank*, [1906] 2 Ch. 444, it was held that a banker was not entitled to receive payment of his secured debt and hand over the securities after notice of an act of bankruptcy on the part of the customer; not as any limitation of the creditor's rights and powers to deal with the securities, but as a consequence of the debtor's having incapacitated himself from tendering the money.

If this is taken to fall within sect. 45, this case holds good, because the banker has notice of an act of bankruptcy. If it falls within sect. 46, as a payment of money or delivery of property, the position is the same as that defined above.

In face of such ambiguous legislation it is difficult to determine the point; the balance is in favour of sect. 46 being the ruling factor. And apparently that is the view taken by the authorities on Bankruptcy. Williams, 12th edit., 309, after dealing with the above-mentioned cases of *Macarthy v. Capital and Counties Bank* and *Ponsford v. Union and Smiths Bank*, goes on to say: "But now by sect. 46 there must be notice of the presentation of a bankruptcy petition and not merely of an act of bankruptcy." Chalmers and Hough on Bankruptcy, 7th edit., at p. 128, say sect. 46 removes the difficulty arising in such cases as *Ponsford v. Union and Smiths Bank*, implying that the banker would be safe in paying in such cases and not constrained or even entitled to seek the protection of the Court.

A curious feature is that though cheques are debarred from the operation of sect. 46 as not being payments of money to a person claiming by assignment from the bankrupt, payment on any of the anomalous documents drawn on bankers, such as orders for payment with receipt attached, would probably come within that section, as being payment to a person claiming by assignment from the bankrupt. The section draws no distinction

Orders for
payment.

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between legal and equitable assignment. Sir Mackenzie Chalmers has pointed out (Bills of Exchange, 8th edit., p. 15) that instruments, not valid as cheques or bills, may be operative as equitable assignments. An equitable assignment may be as to part of a fund. No particular form of words is necessary in an equitable assignment. Indorsement and gift of a non-transferable deposit receipt has been held a good equitable assignment of the monies deposited. (*In re Griffn*, [1899] 1 Ch. 408.)

Possibly the assignee of part could not make an effective demand as such, but there is an order emanating from the customer, and the assignee is "a person claiming by assignment from the bankrupt," which is sufficient to cover the payment, and this is a preferential treatment as against the far more common and important cheque, which it is difficult to justify.

Postponed Advertisement of Receiving Order

A perilous and unjustifiable pitfall for the banker in connection with the bankruptcy of a customer has recently been disclosed, and remains as yet unremedied.

A practice has grown up by which, when a receiving order is made, the Court suspends the publication or advertisement of the receiving order for varying periods, presumably on the application and in the interest of the insolvent person.

As pointed out by the British Bankers' Association to the Government in May 1921, either from this cause or from mere delay in publication of the receiving order, a large proportion of the receiving orders made every week do not appear in the *Gazette* for a considerable time after they are actually made. A case was cited in which an interval of twenty-seven days elapsed.

When the trustee is appointed, of course all transactions with the bankrupt since the date of the receiv-

ing order fall through, and all property to which the bankrupt was entitled at the date of the available act of bankruptcy vests in the trustee, unless protected. For transactions after the date of receiving order there is no protection whatever; it is not a question of notice or no notice, as with dealings prior to receiving order, but the vesting is absolute as from the date of the order.

The banker has been arbitrarily deprived of the ordinary prescribed warning through the medium of the *Gazette* that his customer has had a receiving order made against him, and he naturally goes on paying that customer's cheques, a facility of which the customer, in the circumstances, is likely to avail himself to the fullest extent, pending publication of the fact that the receiving order has been made.

The customer's credit balance vests in the trustee as from the act of bankruptcy; no protection of any sort can be set up for any transaction after 12 midnight separating the day on which the receiving order was made from the preceding day.

The trustee is entitled to claim, and does claim, from the banker every penny he has paid away since that midnight. A case actually occurred where such claim was made on the morning of the day the order was made.

Naturally, this position did not go unchallenged. In *In re Wigzell*, [1921] 2 K. B. 835, the question arose in concrete form.

A receiving order was made against the debtor, but advertisement thereof was postponed and all proceedings stayed.

During such postponement and stay the insolvent debtor's bankers received £165 to his credit and paid out £195 on his cheques, in perfect ignorance of the receiving order having been made, and of any available act of bankruptcy. The County Court Judge, the Divisional Court, and the Court of Appeal held that

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the banker was liable to the trustee subsequently appointed for the £165 without any allowance for the £195.

Various authorities were cited for the bank, such as *In re Thellusson*, [1919] 2 K. B. 735, where, in the Court of Appeal, Warrington, L.J., said: "The question in this appeal is whether the circumstances of the case justify the exercise by the Court of the jurisdiction it has often exercised of directing its officer, in this case a trustee in bankruptcy, to pursue a line of conduct which an honest man, actuated by motives of morality and justice, would pursue, although not compelled thereto by legal process."

So in *In re Tyler*, [1907] 1 K. B. 865, Farwell, L.J., expressed the same doctrine in even more forcible language: "As I understand the principle laid down in the case to which my Lord has referred, it comes to this: that the officer of the Court is bound to be even more straightforward and honest than an ordinary person is in the affairs of everyday life. It would be insufferable for this Court to have it said of it that it has been guilty, by its officer, of a dirty trick."

And even in this late case of *In re Wigzell*, [1921] 2 K. B. 835, the soundness of the principle was not disputed. Lord Sterndale, M.R., said: "It seems to me to have been established practically that there must be read into sect. 45 of the Bankruptcy Act, 1914, after the second proviso, a third proviso, 'Provided that the transaction, whenever it takes place, is one which it would not be honourable or high-minded for a trustee to impeach.'"

The trouble was that the Court did not see their way to apply the principle to the case in point. One of two innocent parties had to suffer; if the banker did not, the creditors would. It was not the trustee's fault, the publication was delayed on the debtor's behest and behalf, not the trustee's. No doubt the Court, in the

person of the registrar, granted the temporary suppression of the fact of the receiving order, and the Court, in the person of its officer, the trustee, was reaping, for the creditors, the benefit of the postponement. But that did not make it a dirty trick on the part of the trustee, or, apparently, of the Court.

But the real ground was that the trustee was not in a position to exercise high-mindedness, and that there was no breach of high-mindedness in what he did, because he was merely doing what, by the Bankruptcy Act, 1914, he was bound to do, namely, get in for the benefit of the creditors whatever the Act embraces as the property of the debtor.

Lord Sterndale, M.R., says, at p. 856 : “ It has been said that bankruptcy is the creation of statute, and that the decisions of the Courts have added fair-mindedness and high-mindedness to the actual words of the Act of Parliament, but this, to my mind, is asking us to give a protection which can only be given by the Legislature, and it is for the Legislature to consider whether or not it will give it.”

The British Bankers' Association invited the Legislature to consider the matter and drafted a short bill protecting the banker up to such time as he received notice of the receiving order where he had none of an available act of bankruptcy, but nothing has as yet been done, and the claims continue and have to be complied with.

In *In re Wigzell*, Younger, L.J., suggested that the banker might be entitled to stand in the shoes of persons paid by such cheques and so prove in the bankruptcy. This would, in most cases, be an inadequate remedy, and is inapplicable in cases where the bankrupt has drawn out the money himself.

A further example that the Court will not countenance the relinquishment of a legal right by a trustee in bankruptcy on the ground of magnanimity will be found in

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the judgment of the Court of Appeal in *Trustee of A. F. Scranton v. Pearse*, Times newspaper, May 10, 1922 (recovery of bets paid by cheque).

Sect. 6.—Payments to Undischarged Bankrupt

Questions have been raised as to whether a banker should pay or refuse to pay an open cheque drawn by a solvent customer, but payable to and presented by an undischarged bankrupt, known as such to the banker. It may be as well to dispose of the matter here, while dealing with bankruptcy, rather than under the heading of "The Paying Banker."

It is clear that the clause as to bankers in sect. 47, above cited, has no application here; that refers exclusively to the bankrupt's own banker. It is a question between the banker's duty to obey his customer's order and his duty to safeguard that customer's interests and obtain a good discharge of the cheque. To be a good discharge the payment must be in good faith and without notice of defective title in the holder. (Bills of Exchange Act, s. 59.) For the banker to charge his customer the payment must be in good faith and, according to some authorities, without negligence. The banker cannot possibly know whether his customer was aware that the payee was a bankrupt, nor can he know whether the cheque is or is not the result of a dealing for value with the bankrupt in respect of after-acquired property.

Moreover, it is by no means clear that the legislation as to after-acquired property does more than establish the title of the person dealing with the bankrupt for value in respect of after-acquired property to the property he receives; it seems to leave open the question whether the bankrupt gets for good, as against the trustee, property which he receives as the result of the transaction, say

a cheque he gets on the sale of after-acquired goods. Indeed, that he does not do so appears the more probable view. No doubt, till the trustee intervenes, the bankrupt can deal with such as after-acquired property, but the payment of the cheque is not a dealing with the bankrupt for value.

Therefore the banker would not be paying without notice of defective title, would not get a discharge for the cheque, and would possibly be held to have acted negligently.

It would therefore seem advisable not to pay in such circumstances, safeguarding the customer's credit by the answer on the cheque.

Sect. 7.—Overdraft

A banker is not obliged to let his customer overdraw unless he has agreed to do so or such agreement can be inferred from course of business. (*Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society*, 9 A. C., at p. 864; *Cumming v. Shand*, 29 L. J. Ex. 129 (course of business).)

The drawing a cheque or accepting a bill payable at the bank, when there are not funds sufficient to meet it, is presumably a request for an overdraft. (*Eaton v. Bell*, 5 B. & Ald. 34; *Forster v. Clements*, 2 Camp. 17; *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society*, 9 A. C., at p. 864; *Cuthbert v. Roberts, Lubbock & Co.*, [1909] 2 Ch. 226, at p. 233.) But see *London Chartered Bank of Australia v. M'Millan*, [1892] A. C. 292, where the overdraft arose through the unauthorised act of an agent and there were facts which should have put the bank on enquiry.

There is no common law right to charge even simple interest on an overdraft. The claim could, however, be supported on the ground of universal custom of bankers.

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Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim. (*Gwyn v. Godby*, 4 Taunt. 346; *Crosskill v. Bower*, 32 L. J. Ch. 540.) Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and is not, for instance, altered into that of mortgagee and mortgagor. (*Fergusson v. Fyffe*, 8 Cl. & Fin. 121; *Williamson v. Williamson*, L. R. 7 Eq. 542; *London Chartered Bank of Australia v. White*, 4 A. C., at p. 424.) The taking a mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest. (*National Bank of Australasia v. United Hand in Hand Co.*, 4 A. C. 409.)

Sect. 8.—Appropriation of Payments

The law as to appropriation of payments, so far as it concerns bankers, is authoritatively summarised in *Deeley v. Lloyds Bank*, [1912] A. C. 756. At p. 783 Lord Shaw says: "According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither exercises the right of appropriation, one can look on the matter as a matter of account and see how the creditor has dealt with the payment in order to ascertain how in fact he did appropriate it. And if there is nothing more than a current account kept by the creditor, or a particular account kept by the creditor and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation."

In that case the bank had a mortgage as security for overdraft on current account. They received notice of a second mortgage on the same property. They did not break the account but carried to it monies subsequently paid in. These being attributed, under the rule in *Clayton's Case*, 1 Merivale, 572, at p. 608, to the earlier drawings out, extinguished the secured debt, and left the bank correspondingly unsecured with regard to subsequent advances.

The Court of Appeal, by a majority, decided in favour of the bank; the House of Lords reversed this decision and gave judgment against the bank, applying the principle above laid down.

In the Court of Appeal, Moulton, L.J., one of the majority, delivered a most plausible judgment, contending that *Clayton's Case* only established a rule of rebuttable evidence; that appropriation was a matter of intention and that it was absurd to attribute to a bank the intention to appropriate payments in to a secured rather than an unsecured debt, and he ridiculed the recognition of a legal rule which the bank could circumvent by "the simple formality of drawing two horizontal lines in their books and making believe to commence a new account."

But the House of Lords decided otherwise.

The moral is that the process ridiculed by Moulton, L.J., should always be followed where it is desired to preserve a security on which further advances cannot be charged. The account should be ruled off, and a new account opened if further business is contemplated. See *per* Lord Shaw in *Deeley v. Lloyds Bank*, at p. 785.

There are two contentions, not lacking in authority, which seem to be inconsistent with this case, which it would have been well to have had more definitely dealt with.

1. That a creditor's right of appropriation enured

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not finally exercised, even when there was a current account, accounts stated being only rebuttable evidence of such exercise. (See *Cory Brothers v. Steamship Mecca*, [1897] A. C., at p. 295; *Seymour v. Pickett*, [1905] 1 K. B. 715.)

2. That a creditor's appropriation does not bind him unless communicated to the debtor. (*Simson v. Ingham*, 2 B. & C. 65; *London and Westminster Bank v. Button*, 51 Sol. Jour. 466.)

These cases, or some of them, were referred to in *Deeley v. Lloyds Bank*, but no very definite ruling given with regard to them.

Still, it is to be noted that there is no mention of any such qualification in the law as laid down by Lord Shaw, which he adopted from Eve, J. Nor does the case state that there was communication to the customer.

Then there is the rule published by the bank for the guidance of its staff, which ran thus: "Wherever notice is received of a second mortgage or a second charge on any security on which the banker holds a proper charge, the account must at once be ruled off and a separate account opened for subsequent transactions." There is nothing here about communicating with the customer; yet Lord Shaw described the adoption of this rule as a mode of protection open to bankers as familiar and simple as could be imagined, by which the bank quite easily and naturally becomes its own protection. On the basis therefore of this late authority, bankers would be well advised not to rely on either of the two above-mentioned propositions. It might be advisable, however, to bring to the customer's notice the closing of the old account and the opening of the new one.

CHAPTER VI

OBLIGATIONS AND INCIDENTS INDIRECTLY
ARISING FROM THE RELATION OF BANKER
AND CUSTOMER

THERE are duties incumbent on and services undertaken by bankers in connection with their business which arise out of but are not essentially included in the relation of banker and customer.

Among these may be reckoned the following: (1) The duty of secrecy; (2) The giving information as to the credit and standing of the customer, commonly known as a banker's reference; (3) The receipt of valuables for safe custody.

Sect. 1.—The Duty of Secrecy

Whether the customer's account be in credit or overdrawn, the banker must not disclose its condition, save on reasonable and proper occasion. It has never been definitely decided whether the duty of secrecy is a legal one giving an absolute right to at least nominal damages on breach, a moral one only, or an incident of a larger duty on the part of the banker not to do any act to the prejudice of the customer. (*Tassell v. Cooper*, 9 C. B. 509; *Foster v. Bank of London*, 3 F. & F. 214; *Hardy v. Veasey*, L. R. 3 Ex. 107.) It seems probable that if the case of *Taylor v. Blacklow*, 3 Bing. N. C. 235, had been cited to the Court in *Hardy v. Veasey* in answer to their request for an authority for a similar action against an attorney, they would have definitely concluded

Duty of
secrecy.

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in favour of the legal duty. The question of reasonable ground or occasion is one for the jury, and the honest intention of the banker to benefit the customer does not necessarily justify the disclosure. (*Hardy v. Veasey, ubi sup.*) It is held in some quarters that the banker may, in answer to enquiries, especially if from Trade Protection Societies, legitimately give general information as to the customer's financial position. Seeing that such information must be mainly based on or derived from the state of the account, the only official source of the bank's knowledge, the distinction is scarcely convincing, and the preference given to Trade Protection Societies one which a jury might fail to appreciate. At the same time, it is obvious that in discounting business the discounting banker is wholly dependent on the acceptor's banker for information as to his financial position, and it might be satisfactory if a court could be got to recognise a reasonable latitude in such cases, at any rate between banker and banker. Foundation for such recognition might be found in the remarks of Bramwell, B., in *Swift v. Jewsbury*, L. R. 9 Q. B. 301, where he said, "It is true that the jury have found that it was within the scope of the manager's authority to give the information asked for; and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to show in order that a corresponding courtesy might be shown them." It might be suggested that by accepting a bill payable at his bankers' the acceptor invites reference to them. Probably the banker would not be liable for libel or slander in any case where he *bond fide* answered such enquiries if made by a person interested in the matter, provided he confined his answers to facts within his own knowledge. (*Robshaw v. Smith*, 38 L. T. 423.) Of course, where the customer gives his banker general

or special authority to answer enquiries there can be no question of breach of duty. In the judgment of the Court of Appeal in *Parsons v. Barclay & Co. and another*, 26 Times L. R. 628, reference was made to "that very wholesome and useful habit by which one banker answers in confidence, and answers honestly, to another banker, the answer being given at the request and with the knowledge of the first banker's customer."

Sect. 2.—Giving Information as to Credit and Standing of Customer—Banker's References

The accepted views on the banker's position with regard to this matter have had to be modified since the majority judgment of the House of Lords in *Banbury v. The Bank of Montreal*, [1918] A. C. 626. It was generally held that when a banker gave information to a customer or a third person as to the credit or financial position of an individual or concern, the banker was not liable to the person to whom it was given for loss accruing through its being false unless the representation was in writing and signed by the banker himself, the signature of a bank manager not being for this purpose that of his bank. Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6, was supposed to enact this, and the view was supported by *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Hirst v. West Riding Union Banking Co., Ltd.*, [1901] 2 K. B. 560.

Lord Tenterden's Act.

In *Banbury's Case*, the House of Lords, though differing on other points, were unanimous on this; that Lord Tenterden's Act had really no bearing whatever on the matter. As they pointed out, its wording, "signed by the party to be charged therewith," and the circumstances of its enactment clearly show that the Act only applies to false and fraudulent representations as to the

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credit of a third party and only to actions on such representations. They cited with approval the words of Bramwell, B., in *Swift v. Jewsbury*, *ubi sup.*: "The effect of the statute is this, that a man shall not be liable for a fraudulent misrepresentation as to another person's means unless he puts it down in writing and acknowledges his responsibility for it by his own signature."

And the House of Lords affirmed the pre-existing view that, in any event, the signature of a bank manager was not sufficient to bind the bank under the Act.

So it comes to this: Lord Tenterden's Act can only be invoked by the bank in the event of the bank being sued for a false *and fraudulent* misrepresentation as to the credit of a third party. Innocent representation it does not touch.

Negligence.

Putting fraud out of the question, what ground of liability can be suggested against the bank? "An innocent representation, *per se*, constitutes no cause of action." (Per Lord Wrenbury in *Banbury v. Bank of Montreal*, at p. 713; cf. *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30.) The only remaining possibility is an action for negligence in making the representation, not on the representation itself. As Lord Wrenbury says, at p. 713, "Innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action."

But there are difficulties in the way of such an action. There can be no negligence without a duty; the plaintiff must show that a duty existed towards him and a breach of that duty. In *Banbury's Case* he apparently was not a customer, he paid no money into the bank, and was merely recommended to their kind offices by a customer. He was charged nothing for the advice he got as to the credit and standing of the company in

which he invested and lost his money. A local, not a head, manager was the actual person who gave the advice.

So the question narrowed down to whether it was part of a bank's business to advise on investments. As Lord Wrenbury said, the question whether it was within the scope of their business was at the root of the matter. And that question was crucial in two respects. First, because if advising was within the scope of the business, it established a duty and also a measure of the skill, non-exercise of which would constitute negligence.

The case was treated as analogous to that of gratuitous services rendered by a person professing special knowledge and skill in a particular line, say a surgeon. If he volunteers his aid and it is accepted, the confiding his body to him by the patient is sufficient consideration to raise a duty on the part of the surgeon to bring to the case and use such skill and care as are reasonably to be expected from a man of his position and pretensions. Lord Finlay said: "The limits of a banker's business cannot be laid down as a matter of law. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."

Lord Parker said: "It would be difficult to establish that advising on investments was part of the business of banking."

In the second place, the question whether advising on investments was within the scope of the bank's business was material, because on it depended whether the local manager had authority to bind the bank, whether negligence on his part would constructively be negligence on the part of the bank.

It had been contended that a general manager might have such authority, but not a local manager.

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Here again opinions differed. The two law lords, Finlay and Shaw, who were in favour of the plaintiff, held that the authority extended to the local manager; of the three, Parker, Atkinson, and Wrenbury, who decided in favour of the bank, Lord Parker based his judgment mainly on this ground, that there was no evidence on which a jury could find that the bank were bound by the act of the manager, and so the question of negligence did not arise. Lords Atkinson and Wrenbury were more influenced by the consideration that advising on investments was not shown to be within the scope of the bank's business, and therefore there could be no authority to devolve.

In Lord Wrenbury's opinion, if the first proposition had been proved, the devolution of authority would have automatically included not only the general but the local manager. As he forcibly puts it: "Either advising on investments was within the business of bankers or it was not. If it was, then not the head manager only, but the local manager, within his district, would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorise the local manager to do it." (P. 715.)

Save for the authoritative exposition of Lord Tenterden's Act, this case cannot be regarded as very conclusive.

Should the question again arise, it seems probable that evidence would be forthcoming that advising on investments was the common practice of bankers, and if it were shown that some of them participate in the broker's commission, a court would very likely find it to be a part of banking business. There appears to be some subtle distinction between advising on investments and giving information as to the credit and standing of third parties. In *Robinson v. National Bank of*

Scotland, 53 Scottish Law Reporter, 390, also a House of Lords case, the bank and their agent were being sued for false and fraudulent representation as to the credit and standing of two persons with whom the pursuer became co-guarantor. Lord Haldane said: "In a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But where a mere enquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred." (P. 392.)

This case, decided in 1916, was not cited in *Banbury v. Bank of Montreal*. Answering such enquiries from another bank acting on behalf of a customer is within the scope of banking business (see *ante*, pp. 77, 78), and it is difficult to see why there should be no duty to be careful in this case, whatever be the status of advising on investments. In *Parsons v. Barclay & Co.*, 26 Times L. R., Cozens Hardy, M.R., is reported as saying that he wished emphatically to repudiate the suggestion that when a banker was asked for a reference of this kind it was any part of his duty to make enquiries outside as to the solvency or otherwise of the person asked about, or to do anything more than answer the question put to him honestly from what he knew from the books and accounts before him." This recognises a duty in somewhat larger terms than does Lord Haldane. But on either basis, not much responsibility would seem to attach to the banker.

Wilson v. United Counties Bank, Ltd., [1920] A. C. 102, was an exceptional case. The plaintiff, a customer of the bank, was leaving for war service. It was agreed

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between him and the general manager that the local manager at B. should supervise the plaintiff's business and see it carried on, particularly the financial side, and take all reasonable steps to maintain his credit and reputation. The jury found that the bank was negligent in performing their duties under this agreement and awarded £45,000 damages for loss to plaintiff's estate, and £7500 injury caused to his credit and reputation. The House of Lords, reversing the Court of Appeal, restored the judgment for these amounts.

It cannot be that functions such as the above are within the scope of banking business. The plaintiff was overdrawn, but the overdraft was secured and there does not appear to have been any other consideration for the agreement. *Banbury v. Bank of Montreal* does not seem to have been cited, nor is there any reference to the scope of banking business in the judgments. It is difficult to see where the duty of the bank came in, or how the general manager could bind the company.

Sect. 3.—The Receipt of Valuables for Safe Custody

It has become customary for bankers to assume the charge of plate chests, securities, and other valuables belonging to customers, for the convenience of the latter. No charge is usually made for such accommodation.

In common phraseology, the goods are said to be delivered to the banker for "safe custody," and in acknowledgments and receipts these words, "for safe custody," sometimes occur.

No additional liability by reason of words "for safe custody."

It appears clear that the use of these words does not affect the measure of liability of the banker; does not make him an insurer. Some of the early cases on the point are difficult to reconcile. They are all studiously reviewed in *Ross v. Hill*, 2 C. B. 877, where the Court arrived at the conclusion that an undertaking in such

terms must be interpreted in the light of the legal consequences arising from the relation between the parties, and that the express contract did not extend the liability.

The first question, therefore, is, what is the relation between banker and customer where the goods are received by the former ; is the banker a bailee for reward, with the liabilities attaching to that position, or a gratuitous bailee with only the liabilities of such ?

Bailee for reward or gratuitous.

It has been contended that the custom of bankers taking charge of their customers' valuables is so common that it is an implied part of the contract, when a man opens an account, that the banker will, if required, receive his valuables to a reasonable extent and for a reasonable time ; that the opening the account affords consideration for this undertaking, as well as for the ordinary duty to repay the money and to honour cheques. It would, of course, be open to the customer, when opening the account, to make express stipulation as to such accommodation ; in which case there would be sufficient consideration to place the banker in the position of a bailee for reward.

But in the ordinary state of affairs, where nothing is said at the time of opening the account, and where there is no payment for the accommodation, the position of the banker is that of a gratuitous bailee. It was so held in *Giblin v. M'Mullen*, L. R. 2 P. C. 318 ; *Re United Service Company*, L. R. 6 Ch. 212 ; and *Leese v. Martin*, L. R. 17 Eq. 235. It is true that in *Brandao v. Barnett*, 12 Cl. & Fin., at p. 809, Lord Campbell, speaking of the custom of bankers to receive the interest on exchequer bills for their customers, says : " I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be

Banker usually gratuitous bailee.

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claimed on the plate chests. In both cases, a charge might be made by the bankers, if they were not otherwise remunerated for their trouble."

This *dictum* is, however, too vague and indirect to stand against the authorities on the other side. There is no suggestion of any such custom or undertaking in the summary of the reciprocal implied agreement between banker and customer by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.

Langtry v.
Union Bank.

In consequence of the apprehension excited among bankers by the case of *Langtry v. Union Bank of London*, in 1896, the Committee of the Central Association of Bankers, after taking copious and conflicting legal advice, issued a report on the whole question, which is published in the *Journal of the Institute of Bankers*, vol. xvii., p. 455, in which they say: "The better opinion seems to be that when a banker takes charge of a locked box, supposed to contain valuables (the contents of which, however, are not known to the banker, and to which he has no access), he would be held to be a gratuitous bailee."

Degree of care
required
from
gratuitous
bailee.

The degree of care which a gratuitous bailee is bound to take of property entrusted to him is defined in *Giblin v. M' Mullen* thus: "He is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description." (L. R. 2 P. C., at p. 339.)

The employment of the facilities at the banker's disposal, such as safes, strong-rooms, &c., must, it is submitted, be included in the care a banker must take of his customer's valuables. The utilisation of available means of securing safety is an ingredient in the reasonable care a prudent man would take of his own valuables.

It has been contended that this is not fair on the banker; that it is raising him, who receives nothing, to the same level as a bailee for hire, whose obligation is

to put himself in a position to take the highest degree of care possible, to adopt all precautions and means of ensuring safety known to contemporary science (cf. *Queensland National Bank v. P. & O. Steamship Navigation Co.*, [1898] 1 Q. B. 567) ; and that it is unreasonable that the strong-rooms and safes, which a banker happens to have for his own purposes, should be gratuitously at the service of the customer, who could nowhere else get the same convenience without paying for it. But the rule as above laid down holds good. The distinction is really this : the gratuitous bailee must do his best with what he has got, he must use all facilities of which he is possessed, but he is not bound to do more. He is not bound to provide at his own expense the means of ensuring a higher degree of security for the articles deposited with him ; whereas the bailee for hire is bound, as before stated, to adopt at his own expense all appliances and safeguards procurable.

Banks being generally provided with such appliances and safeguards, the question as to whether the banker is a gratuitous bailee or a bailee for reward becomes practically an academic one in estimating the degree of care to which he is bound.

It does not seem that the banker's knowledge or ignorance of the nature of the goods entrusted to him affects the question of his liability.

Knowledge of
nature of
articles.

The rule was laid down in *Giblin v. M'Mullen* in the form given, without any qualification as to knowledge or ignorance ; and the facts of that case go very strongly to show that in that instance the bank had no knowledge or means of knowledge of the nature of the goods. Damages for negligence are such as are supposed to have been in the contemplation of the parties at the date of the contract ; and if the goods are taken without enquiry, such contemplation would seem to embrace the value of the goods, whatever it might prove to be. If a

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customer brings a box for safe custody, there is a presumption that it contains articles of value. If, however, he mislead the banker in any way as to the value, he would infallibly be held bound by his representations, and could hold the banker to no greater liability, either as to degree of care or amount of compensation, than was commensurate with goods of the character represented by him ; if indeed that.

Liability for
fraud of
servants.

Apart from negligence facilitating such an act, a bank is not liable for the loss of a customer's goods by the fraud or felony of members of its own staff. In *Foster v. Essex Bank*, 17 Massachusetts Reports, 478 (approved in *Giblin v. M'Mullen*), the cashier and chief clerk of the bank fraudulently took, and absconded with, specie deposited by a customer. The Court held that the bank was not responsible for their fraud or felony, as, when they abstracted the customer's gold from the cask in which it was contained, they were not acting within the scope of their employment ; and added : " The bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank."

The case of *Langtry v. Union Bank of London* (Journal of the Institute of Bankers, vol. xvii., p. 338), which was settled by judgment for the plaintiff by consent for £10,000, arose out of the delivery of the goods to an unauthorised person, on a forged order.

The bank's counsel, in announcing the settlement in court, said that the bank would not have submitted to any judgment implying negligence on the part of their officials, without the fullest investigation of the law and the facts.

What right
of action
apart from
negligence.

The question naturally arose as to what, if any, right of action accrued to a customer in like circumstances, apart from negligence ; and legal opinion was, as before stated, divided on the point.

The Central Association of Bankers went fully into the matter, and in their memorandum, previously alluded to, they say: "It is necessary to distinguish between cases in which valuables are by mistake delivered to the wrong person (as in Mrs. Langtry's case) and cases in which they are destroyed, lost, stolen, or fraudulently abstracted, whether by an officer of the bank or by some other person. The best legal opinion appears to be that, in the former case, the question of the negligence of a bailee does not arise; that the case is one of wrongful conversion of the goods, and that the bank is liable for this wrongful conversion, apart from any question of negligence."

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Though controverted by some, this view is undoubtedly correct. It is founded on the distinction between commission and omission, between the active interference with the property, involved in the voluntary handing over of the goods to a person not entitled to receive them, and the mere passive neglect of duty which may result in their loss. The former, if induced by specious fraud, may be in no wise blameworthy, but conversion is independent of any such consideration.

Commission
and
omission.

Authority for this position is not wanting. The cases have usually been those of carriers who have delivered goods to the wrong person. The earlier authorities are summarised in *Stephenson v. Hart*, 4 Bing. 475, Parke, J., saying: "From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person. In *Ross v. Johnson* a distinction was taken between misfeasance and nonfeasance, and it was holden that trover would not lie where a carrier had lost goods by a robbery or theft, Lord Mansfield and Aston, J., considering that a case of mere omission. But in *Youl v. Harbottle*, Lord Kenyon, referring to *Ross v. Johnson*, said that where the carrier was actor and delivered the goods to a wrong person he

Authorities
in point.

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was liable in trover." Gaselee, J., dissented, on the ground that the goods had in fact been delivered to the person for whom they were intended, although that person had procured their consignment by fraud; but he says, "For delivery to a wrong person a carrier is no doubt responsible in trover." In *M'Kean v. M'Ivor*, L. R. 6 Ex. 36, Bramwell, B., in referring to this case, said: "There were circumstances there to excite suspicion; but I think the reasoning of Gaselee, J., who dissented from the judgment of the Court, is right. There was nothing to show that it was not W. who received the box; it may rather be collected that it was." But he does not impugn the law as there laid down; in fact he says (p. 41), "I assume that a misdelivery would have been a conversion."

Involuntary
bailees.

Duff v. Budd, 3 B. & B. 177, was a case of misdelivery under circumstances of gross negligence, and the judgments are based on that negligence; but it is submitted that the importation of negligence is accounted for by the fact that the defendant's position was that of involuntary bailee, the contract of carriage having come to an end (see at p. 181), with the consequent liabilities hereafter appearing.

In *Heugh v. London and North-Western Railway*, L. R. 5 Ex. 51, both *Stephenson v. Hart* and *Duff v. Budd* were quoted. In that case, the goods had been tendered by the defendants at the place to which they were addressed, but the person in charge of the premises refused to receive them. The defendants deposited the goods in safety and sent an advice note to the consignees, requesting instructions for delivery, and further, that on sending for them the advice note should be produced. The advice note was presented a few days after by a person who demanded delivery on behalf of the consignees, and the goods were delivered to him.

The Court held that the defendants' character as

carriers was at an end when the goods were refused, through no default of their own; and that they thereupon became involuntary bailees, with no obligation except to act reasonably in the circumstances.

In his judgment, Kelly, C.B., refers to this position of the defendants as involuntary bailees, and asks whether as such they became subject to an absolute duty to deliver to the proper person, so as to be liable for a misdelivery, though without negligence, and says: "The only authorities in the courts of this country cited in support of that proposition are *Stephenson v. Hart* and *Duff v. Budd*; but in neither case was it held or even contended that the misdelivery amounted as a matter of law to a conversion, but in both cases it was admitted to be a question for the jury, and the question was in fact left to them, whether, under all the circumstances, the defendants had acted with reasonable care. It is plain then, on the authority of those cases, that misdelivery under such circumstances is not, as a matter of law, a conversion, but that it is a question of fact for the jury whether the defendants have exercised reasonable and proper care and caution."

It is to be noticed that in both the cases quoted in this judgment there had been a previous refusal to accept the goods or a failure to discover the consignee; so that in them, as in this latter case, the defendants were really in the position of involuntary bailees. In view of his opening question, these remarks of Kelly, C.B., must be confined to the case of involuntary bailees, especially as he says at p. 56: "It is true that a misdelivery by a carrier has been held to amount to a conversion." The case is so explained by Bramwell, B., in *Hiort v. Bott*, L. R. 9 Ex., at p. 90, where he gives as the ground of its decision that an involuntary bailee has the implied authority of the real owner to deal with the goods in any reasonable manner.

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In *Hiort v. London and North-Western Railway*, 4 Ex. D., at p. 194, Bramwell, L.J., says: "It is held that if a man disposes of property, and in law he did if he without authority delivered it to somebody not entitled to receive it, he might be charged with converting it to his own use. A misdelivery by a carrier was a conversion; I cannot see, therefore, why a misdelivery by a warehouseman is not a conversion."

Again, in *Glyn v. The East and West India Dock Company*, 6 Q. B. D., at p. 493, Bramwell, L.J., says: "If a carrier received goods to carry to A. and hold till called for by X., and Y. came and represented himself to be X., a delivery to Y. would be a misdelivery and a conversion according to the authorities." In *Bristol, &c., Bank v. Midland Railway Company*, [1891] 2 Q. B., at p. 657, Lopes, L.J., says: "Delivery to a wrong person would be conversion."

There is nothing in the character of a carrier which makes him specially obnoxious to conversion: his liability as insurer is altogether irrelevant to this class of action, and cannot affect it one way or the other. The banker cannot assert the position of an involuntary bailee, and so claim the peculiar privileges of the man who finds goods left on his hands, and is only bound to do the best he can in the circumstances. He does voluntarily, though innocently, deliver the goods to a wrong person, thereby dealing with them in a manner inconsistent with the rights of the true owner, which is sufficient to found conversion.

Those who hold the view that the banker is relieved from liability for commission as well as omission, for misfeasance as well as nonfeasance, unless he is chargeable with negligence, rely mainly on an implied agreement between banker and customer to that effect. They presume a stipulation on the part of the banker that his obligation as to parting with the goods shall be as

Suggested
implied
contract.

circumscribed as that with regard to keeping them; namely, that he shall exercise reasonable care and caution in so doing, and they presume an acquiescence by the customer in such stipulation.

But there seem no sufficient grounds for importing such implied contract into the legal relations arising from the deposit of the goods. The distinction between the legal consequences of loss and of misdelivery can hardly be supposed to have been in the contemplation of the parties; in the absence of express stipulation, each party must be taken to have accepted merely the legal rights and liabilities automatically arising from the deposit and receipt of the goods; and "it is impossible to import a condition into a contract which the parties could have imported and have not done so," *per* Channell, J., in *Blakeley v. Muller & Co.*, [1903] 2 K. B. 760, note. The endeavour to import terms into contracts is persistently discountenanced by Courts nowadays. (*Guarantee Trust Co. v. Hannay*, [1918] 2 K. B., at p. 664.) As before stated, the view adopted by the Central Association of Bankers is the true one.

The question of the banker's expressly contracting himself out of liability for misdelivery has been raised; but the Central Association of Bankers, in the memorandum above referred to, came to the conclusion that, though in theory possible, such a course would be "generally impossible in practice, and where not impossible inadvisable."

Question of banker's contracting himself out of liability.

Adopting this view, the question then arises, what steps can the banker take for his own protection against this danger of misdelivery?

The obvious course, where anyone other than the original depositor applies for re-delivery, would be to decline to deliver on the spot, explaining courteously that not the slightest aspersion was cast on the applicant's authority whether as agent or assignee of the original

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depositor, or on the right and title of such original depositor, but that the temporary delay was a mere precautionary business custom in order to verify the application, and that, if desired, the article or articles would be delivered as soon as the usual enquiries had been made.

Against this it is objected that in so doing the banker, if the application is genuine, is guilty of a technical conversion of the goods, and that he would have to convince a jury that he had reasonable grounds of suspicion, and had acted *bonâ fide*; or else pay damages to the original depositor or his assignee as the case might be.

The leading authority on the question is that of Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. of L., at p. 766: "A demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title and for the purpose of claiming the goods either for the defendant or a third person it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and, having a *bonâ fide* doubt as to the title to the goods, detains them for a reasonable time for clearing up that doubt, it is not a conversion. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances, excused, if not justified."

In *Vaughan v. Watt*, 6 M. & W., at p. 497, Lord Abinger, C.B., said, "If the question had been brought before the jury whether a reasonable time had elapsed for the defendant to ascertain the title to the goods, nobody can doubt that they would have come to the same conclusion [viz. that such reasonable time had elapsed]. The mere detention of the goods abstractedly was not a conversion if the delay was only for a reasonable time; here I think the time was unreasonable."

Parke, B., said, "It was a question for the jury whether the defendant meant to apply the goods to his own use or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had elapsed; without which it would not be a conversion. It ought, therefore, to have been left to the jury whether the defendant had a *bond fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed."

In *Clayton v. Le Roy*, [1911] 2 K. B. 1031, Moulton, L.J., said, "The authorities show clearly that a man does not act unlawfully in refusing to deliver up property immediately upon demand made; he is entitled to take adequate time to enquire into the rights of the claimant."

Farwell, L.J., quoting Baron Bramwell in *Burroughes v. Bayne*, 5 H. & N. 308, said, "You must in all cases look to see, not whether there has been what may be called a withholding of the property but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. Refusal to deliver up property to the true owner is not in itself a conversion but is evidence of it." And again, "I cannot conceive anyone being so foolish as to hand over a watch to a man whom he had never seen and who presented no credentials in writing. In my opinion it was the duty of the defendant to refuse to hand the watch over."

Vaughan Williams, L.J., dissented, but agreed that the defendant might well have the right to enquire into the antecedent history of the watch in that particular case, and added, "A man may do an act inconsistent with the dominion of the true owner, for instance, if the thing is detained for the purpose of making a reasonable enquiry into the title."

Reading these citations dispassionately, the true

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conclusion seems to be that there can only be conversion where the defendant asserts a title adverse to that of the true owner, either in himself or a third party (cf. *Warren v. Baring Brothers*, 54 Solicitors' Journal, 720), or where, while not expressly doing this, he detains the goods from the rightful owner for an unreasonable time, thereby impliedly doing so. If the depositor himself applies, any delay is unreasonable, and refusal is a negation of his title.

Where a professing agent or messenger demands delivery there is, *ex necessitate rei*, a reasonable doubt as to his authority, as real as any doubt as to title. He may be known to the banker in connection with the customer, but that is no assurance that he is acting with the customer's authority on this particular occasion. Reclaiming valuables is not within the scope of anyone's employment. Farwell, L.J., no doubt speaks of the absence of "credentials in writing." But he was only enumerating one of the many factors in that case which justified the defendant's refusal; he does not infer that production of a written document ostensibly signed by the depositor is conclusive evidence of authority. It would be unfair to put any such construction on the Lord Justice's words. The pseudo messenger in *Mrs. Langtry's Case* produced a most plausible document, written on her note-paper and with her signature forged. It is suggested that a banker is bound to know his customer's signature. Mathew, J., finally disposed of that untenable contention in *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7. It is said one is not bound to anticipate forgery. That ingenuous doctrine was rudely shaken in *Macmillan v. London and County Bank*, [1918] A. C. 777.

It is, therefore, difficult to see how, in adopting the course suggested above, a bank can bring itself within any of the definitions of conversion.

It does not assert any title in itself or any third person; it does not impugn the title of the depositor or his assignees to the goods; it merely says: "I claim time to see that all is in order."

And there is a very practical argument in favour of this course. If A. is suing B. for depriving him of his goods and B. has no wish whatever to keep them, it would be a blot on the law if it afforded no means of putting things straight.

So we find in Bullen and Leake, 7th edit., 283, under the head of "Conversion," the following: "In this action the Court will sometimes stay proceedings upon a return of the goods and payment of nominal damages and costs, and on such other terms as the Court think proper to impose; but the general practice would appear to be that if the plaintiff will not consent to accept a return of the goods on the terms considered proper by the Court, he will be allowed to proceed with his action, but if he fails to get substantial damages and so justify his refusal, he may be made to pay the costs subsequent to the application." And they cite *Hiort v. London and North-Western Railway*, *ubi sup.*

Mayne on Damages, 9th edit. (1920), 394, states the same as to staying proceedings. So do Addison on Torts, pp. 597-601, and Clerk and Lindsell on Torts, 7th edit., 279.

See also the very full discussion of the whole subject of conversion and detainue by Sir John Salmond, Law of Torts, 5th edit. (1920), where, at p. 379, he confirms the above views as to the power of the Court to stay the action on defendant returning the goods. Forms of action are no longer the watertight compartments they were, and if a modern judge saw that the real object of an action for conversion was for dubious damages or merely detainue and that the plaintiff could have had and could have the goods any time he liked, he would

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not be likely to let the action go to trial. Even if the action were not stayed and went to trial, the bank would not be in great jeopardy. "When the defendant is willing to deliver up the chattels, the verdict is generally entered by consent at the value of the thing, but only one shilling to be levied upon its being given up. But this is merely matter of arrangement between the parties, and if the subject-matter has been so injured that justice would not be effected by returning it, the verdict will be absolute for the entire value." (Mayne on Damages, p. 393.) One can hardly contemplate counsel for the plaintiff failing to come to such arrangement, with, if necessary, a certain amount of suasion from the judge. In *Churchill v. Whetnall*, 87 L. J. Ch. 524, the judge, in giving plaintiff his costs, expressly did so only on the ground that "the books should have been returned without further proceedings," *i.e.* after writ.

Even if the verdict and judgment were for the full value, if that were paid the property would vest in the defendant. See authorities above cited. Work this out on a concrete case. Suppose the Union Bank had declined to deliver the jewels to Mrs. Langtry's supposed emissary ; but had sent them round to her house shortly afterwards, and finding the request was genuine, tendered them to her, and she had declined and sued them. What would have been the damages? Whereas the £10,000 the Union Bank paid shows the possible consequences of delivery without taking time for enquiry.

For if you deliver to the wrong person, you lose all. You are unquestionably liable for the value of the goods in conversion and you have not got the goods to return or to counterbalance the damages.

If the application comes from a transferee or assignee of a chattel or a chose in action such as bonds or an insurance policy, there are one or two further points. The transferee of a chattel has no direct claim against

a bailee thereof until the bailee has attorned to him. (Cf. *Dublin Distillery Co. v. Doherty*, [1914] A. C., at p. 847.) The banker is not the debtor immediately affected by the assignment of a chose in action, nor the person to receive notice if the assignment is under the Judicature Act. He is a mere depositary, equally not directly liable to the assignee till he attorns. Both are cases of derivative title, as to which the banker is entitled to satisfy himself. And save in the case of title deeds or negotiable instruments it might be a question whether in conversion the measure of damages was not merely that of the chattel, viz. the paper itself.

The banker must not remove the goods from the premises where they were received for custody. If he store them elsewhere, he may be liable for their loss or destruction, apart from any question of negligence. (*Lilley v. Doubleday*, 7 Q. B. D. 510.)

Goods deposited for safe custody are not subject to the banker's lien.

Where chattels are deposited jointly by several persons, the authority of all is requisite before they can be withdrawn. (*May v. Harvey*, 13 East, 197; *Atwood v. Ernest*, 13 C. B. 881; *Brandon v. Scott*, 7 E. & B. 234.)

Even in the case of death of one of the depositors, directions should be obtained from his legal representatives; the property may be not joint, but common, in which case there is no right of survivorship.

A chose in action may be different, as that is not the subject of ownership in common.

CHAPTER VII

DEPOSIT ACCOUNTS

DEPOSIT accounts may be of three classes :—

1. Repayable at call or on demand. 2. Withdrawable on specified notice. 3. For a fixed period.

No right to
draw against.

The customer has no right to draw cheques against a deposit account of class 2 or 3, probably not against a deposit account of class 1.

In *Hopkins v. Abbott*, L. R. 19 Eq. 222, and also in *Stein v. Ritherden*, 37 L. J. Ch. 369, Malins, V.C., expressed the view that deposit account at call was liable to be drawn on by cheque. But, apart from any question of return of the receipt, the obligation to honour cheques is only part of the contract implied between banker and customer, and nowhere else has this ever been recognised as extending beyond the current account. It is clearly not contemplated in the summary of the banker's contractual duties by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.

Where the deposit is at call, notice should first be given to transfer to current account. Where it is withdrawable on notice, due notice should first be given, together with a request to transfer to current account at the expiration thereof.

In either case, the receipt, if any, should be returned.

In practice, where a customer who has a deposit account draws a cheque which his current account is not sufficient to meet, it is not unusual for the banker to honour the cheque, relying on his lien or set-off against the deposit account, and the practice seems free from danger.

Where a form of cheque is indorsed on a deposit receipt, as in *In re Dillon*, 44 Ch. D. 76, it must be taken that the bank agree to honour that particular cheque against the deposit account, or treat that account at once as transferred to current account. CHAP. VII.

Money paid in on deposit account is a loan to the banker, not a specific fund held by him in a fiduciary capacity. (*Pearce v. Creswick*, 2 Hare, 286 ; *In re Head*, [1893] 3 Ch. 426 ; *In re Head* (No. 2), [1894] 2 Ch. 236.) Deposit is loan.

The remarks of North, J., in *In re Tidd*, [1893] 3 Ch. 154, as reported, are somewhat ambiguous, but are clearly insufficient to establish any fiduciary relation.

Deposit Receipts

The judgment in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, which held that there is no debt due from the banker on current account until actual demand made for payment, that therefore the banker cannot set up the Statute of Limitations, but that nevertheless the credit balance on such account is attachable by garnishee process, does not profess to deal with deposit account. A distinguishing feature between deposit and current account is to be found in the deposit receipt. This may take the form of a mere receipt or of a voucher the return of which is made a condition precedent to the withdrawal of the money. In the latter case no cause of action arises until its return. (*In re Dillon*, 44 Ch. D., per Cotton, L.J., at p. 81.) In *Atkinson v. Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377, the question was whether the return to the society of a loan pass-book issued by it was a condition precedent to repayment of the loan ; but there are strong indications that the Court of Appeal had in mind deposit accounts generally, and considered the same principle applicable to them. For Lord Esher, M.R., said of and in that case, " It has no analogy to

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the cases cited where money is deposited in a bank to provide for a current account. The case of money paid in on a deposit account would be very different, and we shall know how to deal with it when it comes before us." He further said, "There are stipulations that he shall give notice of his desire to withdraw the money and that the book shall be produced to the society either by himself or by someone with his written authority. If that be the contract, there is no liability on the part of the society and no cause of action arises against them until all these stipulations have been fulfilled." Lindley, L.J., said, "The fact that they have entered into a special contract at once distinguishes the case from *Foley v. Hill* and *Pott v. Clegg*"; and again, "Production of the book by the depositor himself or by some person with his written authority were conditions precedent to the right to receive back the money." In *In re Tidd*, [1893] 3 Ch. 154, North, J., appeared to understand Lord Esher's words as pointing to the necessity of the return of the receipt before the deposit can be withdrawn. It is really a question of the contract between the parties, as evidenced by the receipt. The fact that a bank could not refuse to pay in the event of the receipt being lost, alluded to in *In re Dillon*, *ubi sup.*, does not affect the question, being merely part of the equitable jurisdiction with respect to lost instruments. (See *Pearce v. Creswick*, 2 Hare, 286.)

Apart from any question of the deposit being repayable on demand, at notice, or at a fixed period, it would seem clear that if the return of the receipt is by agreement of the parties, express or implied, made a condition precedent to withdrawal or repayment, garnishee proceedings will not lie against the deposit account. The *Joachimson Case* goes far in holding that service of the garnishee order *nisi* is equivalent to demand by the judgment debtor; it would be over-straining the effect

of legal process to treat it as constructive substituted performance of another condition precedent, especially one involving the physical return of an actual document, not in the possession of the judgment creditor.

Liability to Attachment

Apart from any question of the return of the receipt, the position seems to be as follows :—

I. A deposit account withdrawable on demand or at call would probably be attached by a garnishee order, on the analogy of other debts payable on demand, which are recoverable without previous actual demand, or by virtue of the judgment in the *Joachimson Case*.

II. A deposit account repayable on specified notice, with respect to which no such notice has been given at the time of the service of the order, is not affected by the order. (*Cowley v. Taylor*, 124 Law Times Journal, 569.)

It is not at that time a debt due, for which the depositor could have immediately and effectually sued. (Cf. *Chatterton v. Watney*, 16 Ch. D., at p. 383.) The debt to be so attached must be a debt owing by the garnishee, a debt of which the judgment debtor could have compelled payment if he desired to do so.

It is not at that time a debt accruing due. There is no direct decision on this point. The accepted definition of a "debt accruing due" is that given by the Court of Appeal in *Webb v. Stenton*, 11 Q. B. D. 518, viz. "*debitum in præsentì solvendum in futuro*."

The examples given in *Jones v. Thompson*, 27 L. J. Q. B. 234, and the fair interpretation of "accruing due" and of the above definition, show that the debt must be one payable at a definite approaching future date, which is not the case with a deposit withdrawable only on specified notice, where no such notice has been given.

III. Where due notice of withdrawal has been given

CHAP. VII. prior to the service of the garnishee order nisi, then, subject to any question of the return of the receipt, the deposit account is attached, because it is then a debt due or accruing due, according as the notice has expired or is still running.

IV. A deposit account repayable at a fixed date is attached by a garnishee order, subject to any question as to return of the receipt, because it is a debt accruing due.

As in the case of current account, where a garnishee order takes effect on a deposit account, the whole is attached, irrespective of the amount for which the judgment has been entered. It seems possible that where a receiver is appointed by way of equitable execution, a bank at which the judgment debtor had a deposit account might be brought into the proceedings, either on the application for a receiver or subsequently, and the order framed or a separate order made so as to affect the money in the hands of the bank. In *Giles v. Kruyer*, [1921] 3 K. B. 23, receivers were appointed by way of equitable execution on a judgment for £500 costs. The judgment debtor had a deposit account of £2300 at a bank. The order appointing receivers was served on the bank on April 7, 1919, but they were no party to the proceedings. The bank, not having heard anything more of the matter, on December 4, 1919, paid the whole £2300 to the judgment debtor. The receivers served the bank with a summons for an order that the bank should pay the receivers £500. Greer, J., dismissed the summons. He said the order appointing receivers, made in the absence of the bank, was *in personam* the judgment creditor only, not *in rem*, and operated only as an injunction to restrain the judgment creditor from receiving the money, not the bank from paying it. He quoted Lord Esher in *In re Potts*, [1893] 1 Q. B. 648: "If the order had charged the money in the hands of the executors

and had ordered them not to pay it to Potts, but to pay it to the receiver, it might perhaps amount to an equitable charge." And he said that in the case before him the plaintiffs had had opportunity from April to December to apply for an order directly affecting the bank. See, however, *Payne v. French*, 10 Irish Jurist, N. S. 52, where the Court held they had power to make an order attaching a deposit account, but not an order for its payment.

The Statute of Limitations is not likely ever to have effective operation on deposit accounts, as it would be barred by payment of interest.

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Effect of
Statute of
Limitations
on deposit
account.

It was with immediate reference to this statute that Lord Esher made the observations in *Atkinson v. Bradford Third Equitable, &c.*, above quoted. If the return of the deposit receipt be a condition precedent to repayment or recovery of the money, its return fixes the starting point of the statute.

The best test as to when the statute begins to run is that laid down by Willes, J., in *Garden v. Bruce*, L. R. 3 C. P., at p. 301: "The six years must be six years on every day of which the plaintiff could have sued out a writ against the defendant."

The conditions before laid down concerning the application of a garnishee order nisi to a deposit account are therefore equally applicable for ascertaining the time at which the Statute of Limitations begins to run.

Dealing with Deposit Receipt

How far the depositor, by dealing with the deposit receipt, may entitle a third person to claim the money from the bank, or debar himself from disputing a payment thereon, is not very clear. It has been decided that a deposit receipt, *per se*, is not negotiable or even transferable. (*Cochrane v. O'Brien*, 8 Ir. Eq. R. 241; *Moore v. Ulster Bank*, 11 I. R. C. L. 512; *In re Dillon*, 44

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Ch. D. 76 ; *Pearce v. Creswick*, 2 Hare, 286.) But in *Woodhams v. Anglo-Australian Life Assurance Co.*, 5 L. T. N. S. 628, Stuart, V.C., held that a deposit receipt passed by delivery and required no assignment, and upheld a direct claim against the company by a third party on a receipt so delivered, free from any set-off against the original depositor. In *In re Griffin*, [1899] 1 Ch. 408, indorsement and delivery of a deposit note was held to constitute a good equitable assignment, notwithstanding the fact that the receipt bore in two places the words "This receipt is not transferable."

The truth is that the deposit receipt itself, whether it says so on its face or not, is not transferable, certainly not negotiable. The mere passing it to another person has no effect in transferring the deposit account. But that which it represents, the money deposited, lent to the banker, is a debt or chose in action assignable like any other debt or chose in action, independent of the receipt and despite any restriction on the transferability of that receipt. As shown by *In re Griffin*, even the receipt itself may be utilised as the basis of an equitable assignment. It makes no difference whether the debt is repayable at notice or a fixed date, or that it cannot be claimed without returning the receipt. It is always there ; always a chose in action, with the attributes of such, including assignability. When Courts use the expression that there is no debt till return of the receipt, they mean there is no enforceable debt, no immediate cause of action, not that the debt is non-existent till then. Whether the debt has been assigned or not, the banker is no doubt entitled to the return of the receipt if he has stipulated for it, but he is not entitled to refuse to accept it from the hands of an assignee, whatever its terms.

It does not seem the custom of banks to issue deposit receipts in a form inviting or authorising transfer ; any bank so doing would probably be estopped from

disputing their transferability and power to carry the deposit. If payable to bearer on demand, such receipt would probably constitute an infringement of the Bank Charter Act, 1844.

But payment to a third party on any form of deposit receipt alone is open to serious risk. Putting a regular transfer thereof as high as an equitable assignment, the mere possession of the deposit receipt, even indorsed by the depositor, is not conclusive evidence of such equitable assignment. Such possession is consistent with circumstances other than intentional assignment, in which case payment to the holder would not necessarily discharge the bank from liability to the depositor. (Cf. *Evans v. National Provincial Bank*, 13 T. L. R. 429.) A valid equitable assignment would, however, apparently constitute a good defence against a subsequent claim by the depositor. (See *per* Maule, J., in *Partridge v. Bank of England*, 9 Q. B., at p. 413.) A deposit receipt not being a negotiable instrument, the bank is not entitled to exact an indemnity from the depositor before paying him, if he has lost the receipt.

Some banks issue a form of deposit receipt with a cheque form at the back. This cheque form being filled up by the depositor, either for the whole or a part of the money deposited, and notice given if required by the terms of the deposit, the cheque is paid by the bank to the holder as an ordinary cheque. (See a form set out in *In re Dillon*, 44 Ch. D. 76, and *In re Mead*, 15 Ch. D. 651.)

Deposit receipt combined with cheque.

The legal significance and effect of such documents seems open to argument.

In *In re Dillon* the Court of Appeal regarded the cheque part as not inconsistent with the general character of the document as a deposit receipt, treating it more in the light of a device of the bank to insure a receipt for the money when withdrawn.

On the other hand, in *In re Mead*, a similar document,

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emanating from the same bank, was, when filled up for part only of the deposit, treated by Fry, J., purely as a cheque; and this case is not displaced, but recognised, by *In re Dillon*.

No doubt the existence of the signed cheque would be some evidence of payment, as an ordinary paid cheque retained by the banker as a voucher is.

But the primary object of a cheque is as a means of obtaining money, not of showing it has been paid, and when one finds the cheque form adopted, the natural conclusion is that the primary object is intended.

Whether the cheque form be used for the whole or part of the deposit account cannot vitally affect its import; if its use be restricted to the withdrawal of the full amount at one time, it may somewhat favour the receipt theory.

Not an
assignment
of the debt.

It has been further suggested that the document when filled in and notice in writing given to the bank constitutes a valid assignment of the debt within sect. 25, sub-sect. 6, of the Judicature Act, 1873.

The cases of *Hopkinson v. Forster*, L. R. 19 Eq. 74, and *Schroeder v. Central Bank*, 34 L. T. N. S. 735, are, however, fatal to any such contention. If not a cheque, it is only instructions to the bankers. Moreover, if payable to order or bearer, there would be no assignment to a specified person.

On the whole, the form would seem designed as a cheque, with a view to securing the transferability of the deposit account.

The bank must be regarded as undertaking, either at any time or on expiration of the stipulated notice, to transfer the whole or part of the deposit, or treat it as transferred, to a drawing account and honour the cheque against that. (See *In re Mead*, *ubi sup.*)

There is no legal objection to a cheque being drawn

on the back of another document, say a visiting or playing card. CHAP. VII.

The only difficulties in the way of treating this particular form of cheque as a good negotiable cheque for all purposes arise from two considerations :— Difficulties in treating as cheque.

(1) Is it for a sum certain ?

(2) Is it payable only out of a particular fund ?

The answer of course depends on the wording of the cheque form.

If no sum is inserted, the amount payable being defined by reference to the deposit, it would have to be argued that "*certum est quod certum reddi potest*," and that the reference to the sum specified on the receipt is sufficient. But there seems to be no authority for going outside the four corners of a bill to ascertain its terms. So it would not be for a sum certain.

If no sum is inserted, payment must be taken to be of the deposit. In relation to cheques, the deposit account is an independent fund, and the direct inference is that it is the fund to be drawn on. It is spoken of as a fund in *In re Griffin, ubi sup.* So it would be payable out of a particular fund.

If the cheque is simply completed by the insertion of a specific sum, the mere existence of the deposit receipt, on the reverse side, would not restrict the payment to that particular fund ; at most it would indicate the particular fund whence the drawees were to reimburse themselves, which is no obstacle to the validity of a cheque. (Bills of Exchange Act, s. 3, sub-s. 3 (a).)

Deposit receipts are exempt from stamp duty. Question as to stamp duty.
(Stamp Act, 1891, s. 103, exemption 1.)

The Inland Revenue have sought to tax, as promissory notes not payable on demand, bankers' receipts for deposits for fixed periods, which specified the date at which the deposit would be repayable and the rate of

CHAP. VII. interest allowed. Alternatively they have sought to charge them with stamp duty as agreements.

Neither claim can be supported :—

(a) The provision as to repayment does not render such documents promissory notes within sect. 33 of the Stamp Act, 1891, as containing a promise to pay a sum of money. The primary purpose of the document is something different; and the promise to pay, if any, is only the recognition of a legal obligation resulting from the contract of loan. (See *per* Lord M'Laren, in *Thomson v. Bell*, 22 Court of Session Cases, 4th series, p. 18.)

See also *Horne v. Redfearn*, 4 Bing. N. C. 433, where it was held that the document would have been exempt as a deposit receipt, if given by a banker; and *Mortgage Insurance Corporation v. Commissioners of Inland Revenue*, 21 Q. B. D. 352.

Nor does the provision as to payment of interest take the document out of the exemption.

In 1813, in *Bank of Scotland v. Watson*, 1 Dow's House of Lords Cases, 40, the House of Lords declined to decide whether, under the then existing stamp laws, a proviso for payment of interest deprived the document of the character of a receipt. Consequent on this case, the Stamp Act of 1815 (55 Geo. III. c. 184) expressly enacted that "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited, shall be deemed and taken to be promissory notes."

The repeal of that Act and the total omission of any such provision in the Stamp Act of 1891 show the intention of the Legislature that the inclusion of interest should not for the future preclude such document from exemption as a receipt.

(b) Such a document is not chargeable with stamp

duty as an agreement. See *Horne v. Redfearn*, 4 Bing. N. C. 433, where the Court expressly stated that the document, which they held to be an agreement, would, under the Stamp Act, 1815, have been exempt as a deposit receipt if given by a banker. CHAP. VII.

Where a deposit is in joint names, both parties should combine in withdrawals. On death of one, the fund in ordinary cases passes to the survivor. Where the joint depositors are husband and wife, and there is provision for withdrawal by either, and the wife is the survivor, it may be a question of intention whether the arrangement was merely for convenience during the joint lives, in which case survivorship would be excluded, or whether, beyond this, it was a method of providing for the wife, should she prove the survivor. (See *Foley v. Foley*, [1911] 1 Ir. R. 281; *Williams v. Davis*, 33 L. J. P. 127; *Marshall v. Crutwell*, L. R. 20 Eq. 328.) This is the sort of question with which the banker ought not to be mixed up, and it might be well to anticipate it by the form of the receipt. Joint deposits.

On bankruptcy of the depositor the amount on deposit vests in the trustee as from the act of bankruptcy, but presumably the banker would be protected under sect. 46 of the Bankruptcy Act, 1914, if he paid out the money to the depositor before receiving order and without notice of a petition having been presented.

CHAPTER VIII

CHEQUES GENERALLY

Sect. 1.—By whom must be drawn

Definition.

“ A CHEQUE is a bill of exchange drawn on a banker payable on demand.” (Bills of Exchange Act, 1882, s. 73.)

Not necessarily drawn by a customer.

Sir Mackenzie Chalmers says : “ It is no part of the definition that a cheque should be an inland bill, or that it should be drawn by a *customer* upon his banker.” In *Ross v. London County and Westminster Bank*, [1919] 1 K. B. 678, Bailhache, J., held to be a cheque a draft drawn by one branch of a bank on another branch of the same bank. As hereinafter explained, this decision is, for reasons other than those here treated, obviously wrong.

It is somewhat difficult to contemplate a cheque not drawn by a customer, and there are expressions in the other cheque sections which it is not easy to reconcile with the existence of any different class of cheque. Moreover, until the decision in *London City and Midland Bank v. Gordon*, in the House of Lords, [1903] A. C. 240, there was a canon of construction that where an Act of Parliament speaks of a banker, it means a banker acting in his capacity as such, in correlation with a customer. There was also the canon of construction, expressly recognised by the Court of Appeal in the *Gordon Case*, [1902] 1 K. B. 242, and in *Charles v. Blackwell*, 2 C. P. D. 151, that all statutory provisions for the protection of

the banker are designed to counteract some risk imposed on him, directly or indirectly, by legislation in the interest of the community, and must not be extended beyond the limits required for that purpose. These two eminently reasonable rules overlap with regard to the matter in hand; they are accordingly treated together here.

In the *Gordon Case*, some of the documents involved were bankers' drafts, drawn by the A. branch of a bank upon its head office, payable to G. and M. or order.

Bankers'
drafts.

These were issued by the A. branch to a customer who forwarded them to G. and M. They were intercepted by J., who forged the indorsement of G. and M. and paid them uncrossed into his own account at the B. branch of the same bank.

The House of Lords held that these documents were not cheques or bills within sect. 3 of the Bills of Exchange Act, there being no separate drawer and drawee, and that the power given by sect. 5, sub-sect. 2, to treat as a bill a document in which drawer and drawee are the same person is confined to the holder, as, indeed, it is in terms.

The judgment of Bailhache, J., in *Ross v. London County and Westminster Bank*, *ubi sup.*, is directly contrary to this, and, for this reason, obviously wrong.

They therefore held that the bank was not protected by sect. 60 of the Bills of Exchange Act.

But they did hold that the bank, as paying bank, was protected by sect. 19 of the Stamp Act, 1853, which is as follows :—

Stamp Act,
1853, s. 19.

“ Any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove

CHAP. VIII. that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was, or is, made payable, either by the drawer or any indorser thereof."

Now one would have said that the wording of this section was expressly designed to confine its operation to drafts or orders drawn on a banker *quâ* banker, that is, by a customer.

There is first the use of the word "banker," which, as before suggested, seems to imply the relation to a customer. (And see *Halifax Union v. Wheelwright*, L. R. 10 Ex., at p. 193.)

"Shall be a sufficient authority." In their ordinary acceptation these words point to the relation of banker and customer. A man wants no authority to pay a bill drawn on him as a principal; a banker does want authority to pay away his customer's money. (Cf. sect. 75 of the Bills of Exchange Act.) But in *Charles v. Blackwell*, 2 C. P. D., at p. 159, the Court, in order to secure to the banker protection against the true owner, as well as the customer, read these words as implying a statutory authority derived from the section. This interpretation seems somewhat forced, but justified by the necessities of the situation.

"It shall not be incumbent on such banker to prove that such indorsement," &c. These words are unintelligible, except with relation to a customer's drafts. An ordinary drawee or acceptor pays a bill on his own account; there is no one to whom he looks for reimbursement, no one he can debit. If he pays on a forged indorsement, he has to bear the loss himself unless he can recover the money as paid under mistake of fact from the person he paid it to. There is no conceivable state of circumstances in which there is any duty from him to anybody, rendering it incumbent on him to prove an indorsement to be genuine. Even where he is sued

by the true owner for conversion of the bill, it is incumbent on the true owner to prove that his signature was forged, not on the drawee or acceptor to prove it genuine. The words can only therefore apply to a state of facts in which, but for this section, it would be incumbent on the banker, as drawee, to justify his conduct by proving an indorsement to be genuine. That state of facts is where he has paid a customer's draft out of that customer's money. To entitle him to debit the customer, it would be incumbent on him to show that he had paid with the customer's authority, in accordance with his mandate. If the customer said, "Pay A. or order," and the banker has paid someone purporting to hold under A.'s indorsement, it would be incumbent on the banker to prove to his customer that the person fulfilled the character of A.'s order; in other words, to prove the genuineness of A.'s indorsement.

No doubt, in the *Gordon Case*, these drafts were in a sense drawn on the banker as such, and were issued to a customer; but they were issued by the branch to its customer and paid by the head office, where he was not a customer and had no account which could be debited. No point, moreover, was made of this in the judgment, which would be equally applicable had the drafts been sold to a perfect stranger.

There is nothing in the definition of "banker" in sect. 2 of the Bills of Exchange Act sufficient to differentiate its meaning in that Act. It must therefore be recognised that this decision affects that Act as well, and that it can be no longer asserted that "banker" either in the Bills of Exchange Act or the Stamp Act, 1853, necessarily means a banker in relation to a customer.

Again, this decision militates against the other canon of construction referred to, viz. that all statutory protection to a banker is based on, and must be confined to, the counteracting some additional risk directly or

As affecting
Bills of Ex-
change Act.

Correlative
risk and pro-
tection.

CHAP. VIII. indirectly thrust upon him by the Legislature in the interest of the community at large.

The section in question, like sects. 60 and 82 of the Bills of Exchange Act, has always been regarded as a leading example of this principle and interpreted on those lines.

Lord Lindley, in *Gordon's Case*, and the Court of Appeal in *Charles v. Blackwell*, 2 C. P. D. 151, set forth the facts relating to its introduction. It was inserted in the Stamp Act, 1853, because that Act first authorised the issue of "draft or order for the payment of any sum of money to the bearer or to order," with a 1*d.* stamp; that rate of stamp duty having previously been confined to such documents when payable to bearer, not to order. As the Court say in *Charles v. Blackwell*, at p. 156, with reference to this very section :—

"Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements. The only reason why cheques had not been drawn payable to order before being the expense of the stamp, when the Stamp Act of 16 & 17 Vict. included these cheques among those which should be subject to the 1*d.* stamp, it was, of course, foreseen that the great convenience arising from the use of such cheques would make them of constant recurrence. It was equally certain that the use of cheques drawn to order would expose bankers to serious danger from forged indorsements, payment upon which, as the law then stood, would have been to their own loss. It was against this danger that the 19th section of the Act was intended to protect them. It was not unreasonable that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk."

Here not only is the section treated as applying solely to the case of cheques drawn by a customer on his banker, but the protection is limited to such cases, and the reason for such limitation assigned on the basis above stated. And the main principle is recognised in the judgments in *Gordon's Case* in the House of Lords with reference to sect. 77, sub-sect. 6, and sect. 82.

But by extending the protection to drafts drawn by a branch office of a bank on a head office, the House of Lords would appear to have disregarded this correlation of risk and protection.

It was not and could not be suggested that the Stamp Act of 1853 produced or was likely to produce a large increase in the number of such drafts issued by banks. But there is a far stronger consideration. On the passing of that Act, the payment of an order cheque drawn on a banker by his customer, with a 1*d.* stamp, became a legal obligation on the banker, provided he had available and sufficient funds in his hands.

He was responsible to the customer in substantial damages if he did not pay it. This duty was the foundation of the risk and the limit of the protection. But the issue of a draft such as that in question, even to a customer, remained, and remains, a matter entirely at the option of the banker. The customer cannot draw it himself, or insist on the banker giving it to him. The superadded obligation is confined to paying regular cheques. Therefore such drafts, being purely voluntary and optional on the part of the banker, are altogether outside the reason of the protection against forged indorsement.

It is most unfortunate that, on facts involving only £32 15*s.* 9*d.*, so salutary a canon of interpretation should have been impugned by the House of Lords.

The effect of the decision cannot be imported into sect. 60, for the reason that the latter deals only with

Bearing on
sect. 60.

CHAP. VIII. "a bill payable to order or demand drawn on a banker," and a bill requires separate persons as drawer and drawee. Indeed, the rule as to correlation of risk and protection may probably be regarded as still obtaining, except with regard to this particular section of the Stamp Act, 1853 ; since, as above stated, it was distinctly affirmed by the House of Lords with regard to certain sections of the Bills of Exchange Act, in the same judgments.

Sect. 2.—Requisites in Form

Requisites
in form of
a cheque.

In addition to being drawn on a banker, a cheque must conform to the requisites laid down by the Bills of Exchange Act as necessary to constitute a bill. Under sect. 3 it must be "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to or to the order of a specified person or to bearer." For the general interpretation of this section, see Chalmers' Bills of Exchange.

There are a variety of documents to which statute has annexed some of the attributes or facilities of cheques, particularly that of being effectively crossed, but which are debarred by peculiar characteristics from being included in the general law as to cheques. These will be dealt with at the end of this chapter, and incidentally elsewhere.

The following are the points of the above definition of a cheque which specially affect bankers :—

Must be un-
conditional.

I. Unconditional. The documents which require as a condition of payment the signing a particular form of receipt are, therefore, not cheques. (See *Bavins, jun.*, and *Sims v. London and South-Western Bank*, [1900])

1 Q. B. 270 ; *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.) Where the condition is not imposed on the drawee or banker, but is only addressed to and affects the payee or holder, this does not make the cheque conditional. (*Nathan v. Ogdens*, [1905] 22 Times L. R. 57 ; *Thairlwall v. Great Northern Ry. Co.*, [1910] 2 K. B. 509 ; *Roberts v. Marsh*, [1915] 1 K. B. 42.) In the last-named case, *Roberts v. Marsh*, as reported in the Law Reports, the word "drawee" should read "payee" throughout. See errata at beginning of the volume.

The distinction is a somewhat shadowy one. If the direction is contained in the body of the instrument and runs in terms such as "Pay _____ on the attached receipt being duly signed," that is addressed to the drawee and makes the document conditional ; if it takes the form of a note as "This receipt must be signed before presentment for payment," that is taken to be addressed to and affect only the payee and does not impair the unconditional nature of the cheque. The ground is that it is only the *order* on a bill or cheque which must be unconditional under sect. 3 of the Bills of Exchange Act.

But such a note, even if not directly addressed to the banker, is calculated to catch his eye, and if the cheque were presented with the receipt unsigned, the customer might say it was part of his instructions to the banker not to pay it in that condition.

It is somewhat curious that the signature of any receipt by the payee should not be held inconsistent with someone else receiving the money which the payee states he has, but has not really received. This, however, appears to have been treated as immaterial, probably on the theory that the money is received by the payee either from his transferee or by that transferee as his agent.

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Receipt as
indorsement.

A not uncommon form is for an order cheque with receipt attached to bear a memorandum to the effect that the receipt must be signed by the person to whom it is made payable, no further indorsement being necessary. Even if the requirements as to signature of the receipt are not such as to make the cheque conditional, it is submitted that such signature cannot serve the double purpose of receipt and indorsement, it is not made solely "*animo indorsandi*," or delivered as an indorsement, and that a banker paying it runs the risk of liability in case the signature is a forgery, and that, if crossed, the collecting banker is outside sect. 82.

For further treatment of cheques with receipts attached, see the latter part of this chapter.

To be unconditional a cheque must not be made payable out of a particular fund. (Sect. 8, sub-sect. 3.) As to the bearing of this provision on cheques indorsed on deposit receipts, see "Deposit Receipt" (*ante*, p. 106.)

Must be an
order.

II. A cheque must be an order. As Sir Mackenzie Chalmers puts it, it must be imperative in its terms, not precative, though the insertion of mere terms of courtesy will not make it precative.

Addressed by
one person to
another.

III. A cheque must be addressed by one person to another.

There must be one person as drawer, another as drawee. (*Vagliano v. Bank of England*, in the C. A., 23 Q. B. D., at p. 248; *London City and Midland Bank v. Gordon*, [1903] A. C. 240.)

The head office and branches of a bank constitute for general purposes only one concern or legal entity. (*Prince v. Oriental Bank Corporation*, 3 A. C. 325.) It is for this reason that drafts drawn by one branch of a bank on another branch or the head office, although held to be "drafts or orders drawn upon a banker," within

sect. 19 of the Stamp Act, 1853, are not cheques or bills drawn on a banker so far as the bank is concerned. (*London City and Midland Bank v. Gordon*, [1903] A. C. 240.) As stated before, the judgment of Bailhache, J., in *Ross v. London County and Westminster Bank*, [1919] 1 K. B. 678, holding such a document to be a cheque, is obviously wrong.

Sect. 5, sub-sect. 2, of the Bills of Exchange Act, which enacts that "where in a bill drawer and drawee are the same person, the holder may treat the instrument at his option as a bill of exchange or promissory note," and in a minor degree sect. 50, sub-sect. 2 (c), certainly appear to contemplate the possibility of a bill in which drawer and drawee are the same person. The true interpretation of those sections is, however, that though such a document is not really a bill, the holder may treat it as such, but even then need not give notice of dishonour to the drawer. The right to do so is, in any event, confined to the holder, and cannot help the bank. (*London City and Midland Bank v. Gordon*, [1903] A. C. 240.)

IV. A cheque must be payable on demand.

On demand.

The omission of the words "on demand" in the ordinary cheque form is justified by sect. 10 of the Bills of Exchange Act, which provides that "a bill is payable on demand (a) which is expressed to be payable on demand or at sight or on presentation, or (b) in which no time for payment is expressed."

Limiting time of payment.

There is a clause frequently occurring in dividend warrants and like documents issued by companies, in other respects conforming with the requisites of a cheque, which raises the question whether they are not defective, as not being payable on demand, or as being conditional.

In *Thairlwall v. Great Northern Ry.*, [1910] 2 K. B. 509, the defendants sent to the plaintiff by post a dividend warrant in the following form :—

CHAP. VIII.

Union of London and Smiths Bank,
No. 2, Princes Street, London.

Pay to the order of

The sum of

£ .

E. H. BURROWS, *Secretary*.

Signature of Payee.

Note.—This warrant must be signed by the person to whom it is payable, and presented for payment through a banker. It will not be honoured after three months from date of issue unless specially indorsed by the Secretary.

It was crossed generally. It was lost in the post and never reached the plaintiff. It had not been presented by anybody. Payment was stopped at the bankers. Plaintiff wrote asking for a duplicate warrant. The defendant company agreed to give one on plaintiff signing the usual indemnity. This he refused to do, and sued the company for the amount of the half-year's dividend declared on the stock held by him.

Three of the points relied on by the plaintiff were :

(1) That the document sent was not a dividend warrant, which must be a cheque, *i.e.* an unconditional order in writing on a banker payable on demand.

(2) That the document was not unconditional, because it would not be paid unless presented within three months from date of issue.

(3) That the document not being a negotiable bill, the giving it was no defence to an action for the debt for which it was given.

Bray, J., decided in favour of the defendants on the ground that the only obligation on the company was to send a dividend warrant, which they had done.

But he said, "A dividend warrant, it was said, must be a cheque, and the document sent was not a cheque, because it had this condition at the bottom of it: 'It will not be honoured after three months from date of issue unless specially endorsed by the Secretary.' I have felt a great deal of doubt on this point because of this statement. But, on the whole, I incline to think that this document is a cheque; and is, within the meaning of sects. 73 and 3 of the Bills of Exchange Act, 1882, a cheque and an unconditional order in writing addressed by the drawer to his banker, &c. And I think it is none the less a cheque because of that statement at the bottom of the document. I do not consider that statement makes the order conditional."

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Northern Ry.

Coleridge, J., said: "In my opinion these words have not the effect claimed for them of making the warrant other than an unconditional order for payment. I regard them merely as a definition by the directors, acting under the authority of the stockholders, as to what shall be a reasonable time within which the warrant must be presented, having regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. A cheque is none the less a bill of exchange within the Act because by sect. 74 the drawer may be discharged if the cheque is not presented within a reasonable time, regard being had to the same considerations. These warrants are not made less unconditional than other cheques by having these words at the foot of them, which merely give notice that the directors have fixed three months as a reasonable time within which the warrants must be presented, and after which, if the warrants have not been presented, inquiries will have to be made before the holder receives payment."

It is not easy to see on what ground it was contended that a dividend warrant must necessarily be a cheque.

CHAP. VIII. Sect. 95 and sect. 97 (3) (a) appear to contemplate the contrary.

On the main point, the effect of the note, the judgments are not very convincing. Bray, J., admits very considerable doubt on the matter, while the judgment of Coleridge, J., seems based on a misapprehension.

Sect. 45 (2) governs the rights and liabilities of the drawer and indorsers of a bill payable on demand, other than a cheque, and of the indorsers of a cheque.

Position of
drawer.

No doubt the drawer of a cheque is technically the drawer of a bill payable on demand, and so primarily within this section.

But his actual position is different. The drawer of a bill on demand other than a cheque anticipates, and has a right to anticipate, that the bill will be met by the drawee out of his, the drawee's, own monies, he, the drawer, having presumably given consideration for the bill. Although the bill on demand is seldom, if ever, accepted, and the holder has therefore no claim on it against drawee if he does not pay on presentment, the idea is that the drawer is in some way or other a quasi-surety, and so entitled to know his liabilities within a reasonable time.

That is not the case with the drawer of a cheque. He knows the banker will not pay unless he has money of his, the drawer's, to pay with. He has no recourse, as the drawer of a bill on demand would have, against the drawee, not on his acceptance, because he would not have accepted, but on the undertaking to pay at the consideration for which the bill was drawn. The drawer of a cheque is for all practical purposes the person ultimately, and in the absence of subsequent indorsements primarily, liable on the cheque, and he has no remedy over on the cheque or otherwise against anyone. He is therefore bound to keep money at his banker's to meet the cheque whenever presented, and it would be unfair if, by reason of delay in presentation

of the cheque, he should suffer loss of the money he was keeping at the banker's to meet it. That is the whole scope of sect. 74. It only relieves the drawer where, by reason of failure of the banker, he has lost the money which he is presumed to have left in the banker's hands to meet the cheque, or some of it. Sec. 74.

Sect. 74 takes the drawer of a cheque out of sect. 45 altogether. No doubt sect. 74 says, "subject to the provisions of this Act," but sect. 45 also says "subject to the provisions of this Act." Presumably this makes the effect nil either way. But sect. 45 (2) says, "Where a bill is payable on demand"; sect. 74 says, "Where a cheque is not presented." This may be intended to turn the scale.

No doubt sect. 74 (2) provides, as Coleridge, J., says, that, in determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and bankers, and the facts of the particular case. The "instrument" is, of course, the cheque; this is a sub-section of a section of a group of sections dealing exclusively with cheques, and must therefore be confined to such instruments (cf. *Inglis v. Robertson*, [1898] A. C. 616), while sect. 45 deals with bills on demand. The nature of a cheque is that it is intended for speedy presentment, not, like a promissory note payable on demand, to serve as a continuing security.

Therefore sect. 74 is the ruling enactment as to cheques, excluding the drawer from the operation of or any right under sect. 45.

Therefore, save in the special circumstances contemplated by sect. 74, viz. the failure of the banker having funds of the drawer in hand after reasonable time for presentation of the cheque has elapsed, the drawer's liability enures for six years from issue of the cheque. (Cf. *Laws v. Rand*, 3 C. B. N. S. 442.)

What, therefore, the note means is this: "I, the

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drawer, will not be liable on this cheque and I do not order my bankers to pay it on demand unless presented within three months from issue."

Normally a cheque is payable on demand at any time within six years of issue. No doubt bankers decline to pay a cheque they term stale, that is, one not presented within periods varying from six months to a year after issue; but it has never been suggested that this releases the drawer. It is simply dishonoured, though the drawer might not be able to sue the banker for damage to credit, the refusal to pay being justified by the custom of bankers. Moreover, the period fixed by the note in this case was materially shorter than any recognised by bankers.

The importation of the usage of trade and of bankers and the facts of the particular case in sect. 74 is clearly and absolutely confined to the circumstances and contingency contemplated in that section, namely, the failure of the banker having funds of the drawer in his hands. They have nothing to do with the ordinary case of a cheque, so far as the drawer thereof is concerned. Nor has the drawer any possible authority to usurp the functions of trade and bankers, nor is what he writes on the cheque one of the facts in the particular case. The whole thing is, of course, a shocking piece of legislation; but sect. 74 remedied a still worse condition of the law by which, in such circumstances as are dealt with by that section, the drawer was absolutely discharged, although the bank might ultimately pay nineteen shillings in the pound.

In view of what has been said above, it is submitted that a cheque which is only payable on demand for three months instead of the normal six years is not "payable on demand" within the meaning of sect. 3.

This point was not decided in *Thairlwall v. The Great Northern Ry.* As will be seen from the citation above, the Court went on the question whether the note made

the cheque conditional. They did not, apparently, consider whether it was addressed to the banker or only to the payee.

So far as the "payable on demand" point is concerned, this question does not arise; it only comes in when it is the "order" which is involved; if on any basis the cheque is not "payable on demand," it is not a cheque; it must be "*drawn* . . . payable on demand."

But it may well be doubted whether such an intimation as "it will not be honoured unless presented within three months" could be regarded as having no reference to or significance for the banker, although conveyed in a note.

However, there is the decision of a Divisional Court and so long as it stands bankers will be safe in acting upon it, and treating such instruments as ordinary cheques up to the three months' limit or other limit imposed.

It is understood that the Inland Revenue authorities treat them as payable on demand for stamp purposes.

Post-dated Cheques

Post-dated cheques are, in a sense, not payable on demand. They are cheques issued on one date, dated on the face of them a subsequent one, before which they will not be paid, if the ostensible date is noticed.

The whole subject is a distasteful, and should be an unnecessary, one.

It is difficult to discover any valid reason for the existence or toleration of these anomalous documents. Many reasons to the contrary are obvious.

The man who issues a post-dated cheque gets exactly the same results as a man who gives a bill payable at the same date, with the difference that he borrows the money or postpones the debt at the cost of a two-penny stamp, instead of the *ad valorem* duty stamp he would otherwise have to pay if the amount be over

CHAP. VIII. five pounds. The revenue, or the community, is poorer by the difference, a difference progressive with the amount of the cheque.

Post-dated cheques are a favourite security of money-lenders, who openly advertise their readiness to advance large sums on them, sometimes vaunting the enormous amounts already so lent and the high position of the clients who have availed themselves of the opportunity.

Doubtless, to inexperienced borrowers, the post-dated cheque is less formidable than the formal bill. Post-dated cheques are habitually in use in the lower circles of business life, facilitating transactions of dubious financial soundness; while to the banker they are a perpetual source of annoyance and possible loss.

The only deterrent is the extremely problematical possibility of a penalty on the drawer under sect. 5 of the Stamp Act, 1891 (see Chalmers, 8th edit., p. 395), which has never been, so far as can be ascertained, put in operation. In *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, there are some remarks by Kay, L.J., which tend to negative the applicability of any penalty to the drawer.

Somewhat unaccountably, the post-dated cheque has received a large measure of sanction and encouragement from the Legislature and its administrators. Sect. 13 (2) of the Bills of Exchange Act expressly provides: "A bill is not invalid by reason only that it is ante-dated or post-dated." A whole series of cases establish its validity and perfect capacity for negotiation between the real date of its issue and its ostensible date, and presumably for a reasonable time after that. (See *Hitchcock v. Edwards*, 60 L. T. R. 636; *Carpenter v. Street*, 6 Times L. R. 410; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715.) No objection to the stamp can be taken on any legal proceedings; such objections only apply to a stamp as it appears at the trial; the trial would necessarily be after the ostensible

date, so the stamp is quite in order. See *Royal Bank of Scotland v. Tottenham*, *ubi sup.* CHAP. VIII.

A curious question might arise if the indorsee of a post-dated cheque indorsed to him before its ostensible date sued his indorser, and that indorser set up the defence that the cheque was not presented within a reasonable time after indorsement. Sect. 45 provides that a bill payable on demand must be presented within a reasonable time after indorsement to charge the indorser. Sect. 13 says, "Where a bill or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing or indorsement, as the case may be."

The indorsement presumably is not dated; the indorser could readily show that the indorsement by him was prior, it might be long prior, to the ostensible date of the cheque, which would not be presented before that ostensible date, and contend forcibly that a reasonable period had elapsed between his indorsement and presentation for payment. The only answer would seem to be that the post-dating extends the reasonable time.

The drawer could not take up this line with regard to issue, by reason of sect. 74, as previously explained, unless the banker had failed, and there might be other answers to him.

The question has often been asked why such a cheque, being, on the face of it, payable on demand, is not really so payable, despite the post-dating. The recognition of post-dating by statute and authority point the other way. Anyhow, the banker is not concerned in the matter; his business is not to pay it before the ostensible date, that being his customer's intention and direction; if the holder wishes to raise the point, he can only do so with the drawer. The real trouble is where a banker inadvertently pays a post-dated cheque before the ostensible date. He cannot debit it then, and he must

Not payable
before date.

CHAP. VIII. not dishonour cheques presented in the interval up to the ostensible date, which, but for paying the post-dated one, he would otherwise have paid.

If he pay these and the cheque is not stopped, when the ostensible date arrives he presumably debits the account, though it might fairly be argued that he was not in any event entitled to do so, having paid contrary to his customer's orders, the same as if he had paid a crossed cheque over the counter. But if the cheque is stopped, or at the ostensible date there is no credit balance to meet it, the banker's position is bad, and he stands to lose the money.

Efforts have been made to get out of the difficulty by representing the banker as having purchased the cheque during its currency, and so being holder in due course entitled to sue the drawer.

It may well be that payment by drawee or acceptor before maturity operates as a money purchase of the instrument. (See *Morley v. Culverwell*, 7 M. & W., per Parke, B., at p. 182; *Attenborough v. Mackenzie*, 25 L. J. Ex. 244.)

But in *Morley v. Culverwell*, Parke, B., said, "If the acceptor pays a bill before it is due to a wrong party he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due he is not protected." The case he refers to and cites is *De Silva v. Fuller*, unreported but reproduced Bayley on Bills, 5th edit., 326. In that case a post-dated bearer cheque was lost and was paid by the banker on the day before that it was dated. Held, that the banker was not protected and must repay the loser. With a bearer cheque there could be no question of paying the wrong person.

There seems also to be a difference between payment intended as a discharge, as under sect. 61, even under mistake, and payment made, even by a party to

the bill, with a view to becoming holder, as under CHAP. VIII.
sect. 59.

In *Pollard v. Ogden*, 2 E. & B. 459, a banker paid a bill accepted payable at his bank, of which he was also an indorser. The question was left to the jury whether he paid it as banker or indorser. This test would probably defeat the claim of the banker who was not an indorser to the position of holder in due course. The banker is the customer's agent to pay cheques; he cannot act as principal in relation thereto. Further, he would be met by the argument that the customer had ordered him to pay this particular cheque to another person, and he was bound to obey that order. This seems to have been recognised in *Morley v. Culverwell*, where the point was raised by counsel as distinguishing the case of the banker paying a post-dated cheque prematurely.

In *Emmanuel v. Robarts*, 9 B. & S. 121, in 1868, a post-dated order cheque was presented for payment before the ostensible date; payment was refused and the cheque marked "Post-dated." It was presented again on the ostensible date and payment again refused. In an action by the customer for damage to his credit, the bank was held justified by virtue of a custom of London bankers to refuse payment of an order cheque which they knew to have been post-dated. The custom was recognised as reasonable on the ground of the then existing doubts as to the legality of such post-dated cheques. In face of their distinct recognition by the Bills of Exchange Act and later decisions, such custom could not be supported now, the ground for it having disappeared, and a banker is bound to pay a post-dated cheque presented on or after its ostensible date even though he may have refused payment of the same cheque before and marked it post-dated, when presented before that date. And he runs no risk in so doing. As long

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ago as 1883, the Inland Revenue informed Messrs. Holt & Co. that they incurred no penalty by paying post-dated cheques known to be such.

When a post-dated cheque is sent to a banker for collection before the ostensible date, the banker either presents it at once, or advises his customer that he is holding it for instructions or the arrival of the due date. If he lets the customer draw against it or credits it as cash at once, he becomes holder in due course and could sue on the cheque after the ostensible date, if dishonoured.

V. A cheque must be payable to or to the order of a specified person or to bearer.

Bills, notes, and cheques are so universally described as negotiable instruments that people are apt to lose sight of the fact that there may be a perfectly good bill, note, or cheque which is not negotiable, apart altogether from a question of the not-negotiable crossing in the case of a cheque; and that the sense in which such a bill, note, or cheque is not negotiable includes non-transferability. Sect. 3 of the Bills of Exchange Act enumerates three sorts of bills:—

1. Payable to a specified person. 2. Payable to the order of a specified person. 3. Payable to bearer. Supervening on this, sect. 8 draws a sharp distinction between a bill and a negotiable bill. Under sub-sect. (1) a bill containing words prohibiting transfer or indicating an intention that it should not be transferable, is good between the parties but not negotiable. It is none the less a bill. Sub-sect. (2) introduces a different article, the negotiable bill, defining it as one payable to order or bearer. Sub-sect. (4) defines a bill payable to order as one so expressed, or expressed to be payable to a particular person and which does not contain words prohibiting transfer or indicating an intention that it should not be transferable. Sect. 36, relating to restrictive indorsements, also recognises the distinction between a bill and

“To or to the order of a specified person or bearer.”

Classes of bills.

a negotiable bill. Considerations of these sections will demonstrate the following :—1. That subject, in the case of a cheque, to the not-negotiable crossing, any bill, note, or cheque on which the word “ bearer ” or “ order ” appears, or is imported by the statute, is and remains a negotiable bill, and that no words prohibiting transfer or indicating an intention that it should not be transferred have any place thereon or any effect on its negotiability. 2. That the only not-negotiable bill, note, or (subject to the not-negotiable crossing) cheque, is one made payable to a specified person, not containing either “ order ” or “ bearer,” but containing words prohibiting transfer or indicating an intention that it should not be transferred. There are hints to the above effect in *National Bank v. Silke*, [1891] 1 Q. B. 435, and the conclusion is plain. The terms “ transferable ” and “ negotiable ” are hopelessly mixed up in the Act and in the above-mentioned judgment ; but from the wording of sect. 8 (1) it is deducible that the not-negotiable bill, note, or cheque (as distinguished from the cheque crossed “ not negotiable ”) is not only not negotiable but not transferable ; while it is clear that a negotiable bill, note, or (subject to the not-negotiable crossing) cheque, is not only transferable, but, until restrictively indorsed or overdue, absolutely and fully negotiable. *Meyer & Co. v. Decroix Verley & Co.*, [1891] A. C. 520, is hardly an authority, as the question there was of a qualified acceptance.

By sect. 7, sub-sect. 1, “ where a bill is not payable to bearer, the payee must be named or indicated therein with reasonable certainty.” Indication of payee.

The normal cheque is one in which there is a drawer, a drawee banker, and a payee, or no payee but bearer. Some exceptions are introduced by the Act, notably the fictitious payee under sect. 7, sub-sect. 3. Further latitude has been allowed by decision. In *Chamberlain*

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v. *Young*, [1893] 2 Q. B. 206, a bill, "Pay order," was held good as being equivalent to "Pay to my order." In *Daun and Vallentin v. Sherwood*, 11 T. L. R. 211, Kennedy, J., held that a promissory note in which no payee was named, and which contained neither the word "order" nor "bearer," was good, and payable to bearer, but this decision seems very doubtful.

A cheque payable to "A. B. or order" is, of course, payable to A. B. personally, the "order" being secondary and alternative.

The payee is, as the term imports, the person to whom the drawer primarily intends and directs payment to be made. It rests entirely with the payee whether he will present or negotiate the cheque. If a man presents a cheque payable to "A. B. or order" unindorsed, the legal presumption is that he is A. B. The bank must pay or refuse payment. The right to demand a receipt is very doubtful. It is laid down in *Leake on Contracts*, 7th edit., p. 657, that "tender of a sum of money coupled with a demand for a receipt is not legal tender." In *Jones v. Arthur*, 8 Dowl. 442, a cheque was sent for a certain amount and a receipt requested, the head-note says "required." The cheque was returned as being for an insufficient amount, but no objection was taken to the fact of its being a cheque, or to the request for a receipt. On the question whether this was a valid tender, Coleridge, J., said: "He merely requests the plaintiff to send a receipt, which was not a condition," implying that if a receipt had been demanded or insisted on, that would constitute a condition and invalidate the tender. But there is in ordinary cases, where the amount paid is over £2, a means of compelling the giving of a receipt. Under sect. 103 (2) of the Stamp Act, 1891, if any person refuses to give a receipt duly stamped, where such receipt would be liable to duty, he is liable to a penalty of £10. The indorsement of an order cheque

by payee, though it operates as a receipt, is not liable to duty. (See Stamp Act, 1891, s. 103, exemption 11.) Therefore if payee refuses, he is not liable to any penalty under that section. Anyway, the banker is not entitled to demand this particular form of receipt. CHAP. VIII.

The common practice of paying bankers to refuse payment unless the ostensible payee signs on the back of the cheque seems therefore without justification. It is understood that at least one object of demanding such signature is to get the protection of sect. 60 should the person presenting the cheque not be the real payee. Whether this result would be attained appears doubtful. The reasons for such doubt are as follows :—

Whether protection acquired by obtaining signature of professing payee.

In *Keane v. Beard*, 8 C. B. N. S., at p. 382, Byles, J., held that the payee's signature so obtained was not an indorsement, but a receipt. Cf. Finance Act, 1895, s. 9, where such signature is treated as a receipt.

The Bills of Exchange Act, s. 2, defines indorsement thus: "Indorsement means an indorsement completed by delivery" (cf. *Arnold v. Cheque Bank*, 1 C. P. D., at p. 584). To constitute indorsement there must be, not only delivery, but the operation must be done "*animo indorsandi*," with intention to transfer the instrument by the indorsement. (*Lloyd v. Howard*, 15 Q. B. 995, at p. 1000.) There can be no such intention and no real delivery when the cheque has got home and is merely being presented for payment and discharge. The important words in sect. 60 are that it is not incumbent on the banker to show that the indorsement was "made" by or under the authority of the person whose indorsement it purports to be, the word "made" being more apt to include delivery than "forged," which occurs later in the section.

It may be objected that where the payee first indorses the cheque and then himself presents it for payment, there is equally no delivery. This objection is met

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by the consideration that in such case the banker is, under sect. 8, sub-sect. 3, entitled to treat the cheque as payable to bearer, the only or last ostensible indorsement being one in blank, and that he pays the holder as bearer, not as payee. Sect. 60 then relieves the banker from the effect of forged or unauthorised indorsement. That section does not contemplate any casual knowledge he may have that the payee is the person actually presenting the cheque, and such knowledge could not be imported into the question.

The words of the section which refer to "the indorsement of the payee or any subsequent indorsement" appear to point to the indorsement being for negotiation or at least collection.

So also the form of the protection that it shall "not be incumbent on the banker to show that the indorsement was made by or under the authority of the person whose indorsement it purports to be," seems inconsistent with a case where the signature is affixed by that person in the presence and at the instance of the banker.

The reference in sect. 60 to the banker's being deemed to have paid the bill in due course, notwithstanding the indorsement was forged, points distinctly to the protected payment being one made under the professed sanction of the indorsement, that is, to a holder under it, not to a payee as such.

Sect. 19 of the Stamp Act, 1853, specifically limits the protection to drafts or orders which on presentment for payment purport to be indorsed by the payee, and it might well be argued that the same effect was contemplated in sect. 60, which replaces it with regard to cheques.

It would further be open to question, whether a banker paid such cheque "in good faith and in the ordinary course of business" when he exacted the indorsement merely for his own supposed protection.

Ogden v. Benas, L. R. 9 C. P. 513, affords no authority,

since it was at the instance of the collecting, not the paying, bank that the person claiming to be payee indorsed the cheque. CHAP. VIII.

In *Charles v. Blackwell*, 2 C. P. D. 151, the cheque was already indorsed when presented; but Cockburn, C.J., does say, on p. 157: "By making a cheque payable to order, the drawer obtained the advantage that if the cheque be stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run." This might be cited as showing that, even when obtained as suggested, the signature constituted a forged indorsement, but apparently what was in the mind of Cockburn, C.J., was an indorsement before presentation with the view of making the cheque equivalent to one payable to bearer, especially as the Stamp Act, 1853, s. 19, on which that case was decided, contains the words, "which shall, when presented for payment, purport to be indorsed, &c."

No case on the point appears to have come before the English Courts. In *National Bank of South Africa v. Paterson*, Transvaal Law Reports, 1909, Part II., p. 322, Legal Decisions affecting Bankers, vol. II., 214, a draft of £20 was drawn by the Royal Bank of Scotland on the appellant bank in favour of respondent Paterson or his order, and forwarded by letter to a friend of his. The friend, Cook, received the letter, opened it, took out the draft, presented it at the bank, said he was Paterson, forged Paterson's signature on the back of the draft and received the money, which he appropriated to his own use. Neither Cook nor Paterson was a customer of the bank. Paterson sued the bank for the amount. The bank set up a section identical with sect. 60. The magistrate found for Paterson. The bank appealed.

CHAP. VIII. Rose-Innes, C.J., accepting the line of argument above expressed, dismissed the appeal with costs.

Fictitious or non-existing Person

One of the chief exceptions to the necessity of an actual payee is introduced by sect. 7, sub-sect. 3, which enacts that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

"Fictitious or non-existing person" are terms suitable rather for a philosophic treatise than an Act dealing with mercantile instruments; interpretation is complicated by the antithesis, necessitating differentiation of meaning; and, not unnaturally, judgments dealing with the question exhibit refinements, if not inconsistencies, which render it almost impossible to formulate the general effect of the sub-section.

Decisions on
the point.

The states of fact which have evoked decisions on this sub-section, and the decisions thereon, are as follows:—

A. forges the name of the drawer to a bill ostensibly drawn on B., making it payable to C. or order. He selects the names of drawer and C. to lend colour to the fraud, being the names of persons well known to B. B. is in no wise indebted to the supposed drawer. B. accepts the bill payable at his bankers'. A. forges C.'s indorsement, presents the bill, and obtains the money. The bill is, as against the acceptor, payable to bearer under this sub-section, and the bankers are entitled to debit B. (*Vagliano's Case*, [1891] A. C. 107.)

A fraudulent clerk presents to his employer an order cheque form in which he has inserted the name "George Brett" as payee. There is no "George Brett" known to either the clerk or the employer. By falsely stating that "George Brett" has done work for the employer, the clerk gets the employer to sign the cheque as drawer, forges the indorsement "George Brett," and negotiates the cheque to an innocent person for value.

Held, by the House of Lords, that "George Brett" was a non-existing person, and the cheque payable to bearer. (Clutton v. Attenborough, [1897] A. C. 90, as explained in *North and South Wales Bank v. Macbeth*, [1908] A. C. 137.)

A fraudulent person, by falsely representing to A. that T. A. Kerr has agreed to sell certain shares, induces A. to draw and give him a crossed cheque payable to T. A. Kerr or order, to pay for the shares. T. A. Kerr is a real person of whose existence A. is cognisant, but he has no such shares, and has never agreed to sell any. The fraudulent person, in pursuance of his original intention, forges T. A. Kerr's indorsement, and pays the cheque into his own bankers', who receive payment thereof in circumstances not affording them protection as collecting bankers. Held, by the House of Lords, that T. A. Kerr was not "a fictitious or non-existing person," and that the bank was liable for the amount. (*North and South Wales Bank v. Macbeth*, [1908] A. C. 137. Cf. *Vinden v. Hughes*, [1905] 1 K. B. 795.)

So far as any general principle can be extracted from these decisions, it would seem to be embodied in the following propositions:—

Result of
decisions.

1. That the primary factor is the state of mind and intention of the drawer of the bill or cheque, the original framer of its form.

2. That if the mind of the drawer is directed to a specific existing individual, whom he intends to receive the money, either by himself or a transferee by his indorsement, such a payee is not a fictitious or non-existing person, although by reason of fraud on the part of a third party in obtaining the instrument, such individual could never have acquired or exercised any rights in relation thereto.

3. If, by fraud of a third party, a man is induced to draw a bill or cheque in which the name inserted as payee's is that of an imaginary person [though people

CHAP. VIII. of that name may and do exist], such payee is "a non-existing person," although the drawer contemplated some one of that name receiving the money by himself or a transferee by indorsement.

4. Where a man accepts a bill payable to an existing person known to him, and whom he intends to receive the money by himself or a transferee by his indorsement, but whom the fraudulent person who inserted his name never intended to get hold of the bill or have any rights thereon, the acceptor is liable on the bill as payable to bearer, and it may be treated against him as so payable.

5. Where a bill or cheque falls within the sub-section, it may be treated as payable to bearer, not only by a holder for value, but by anyone else to whose interest it is to treat it; *e.g.* a banker who has paid such a bill, domiciled with him, on a forged indorsement.

Fortunately, in the ordinary case of cheques, the banker's protection would not be dependent on the application or interpretation of the sub-section. As paying banker, he would be protected by sect. 60, as against forged indorsement; as collecting banker, he would be protected under sect. 82, provided the cheque was crossed. The only instances in which the question would become material to him would be if he took such a cheque as holder for value, or collected it uncrossed for a customer who was in possession under the forged indorsement.

Cheques made payable to "Wages or order," "Petty cash or order," or in analogous forms, with an impersonal payee, were formerly in common use and were treated as payable to bearer. The practice is deprecated by the Council of the Institute of Bankers (see Questions on Banking Practice, 7th edit., Questions 711-717), and is understood to be getting rarer.

It is certainly a questionable one. Sect. 7, sub-sect.

"Wages or order."
"Petty cash or order."

3, only authorises such a course where the payee is a fictitious or non-existing "person." CHAP. VIII.

Sect. 2, among other definitions, enacts, "Person includes a body of persons whether incorporated or not."

The natural meaning of "person" excludes inanimate things. The inclusion, by the definition, of entities not usually classed as persons excludes any further extension of the term where used in the Act. The obvious reference of sub-sect. 3 is to persons who, but for their being fictitious or non-existing, would be in a position to indorse.

In *Vagliano's Case*, ([1891] A. C., at p. 129), Lord Selborne said: "The difficulty, to my mind, arises out of the fact that the Legislature has here described 'a person' as fictitious and non-existing, instead of saying 'where the payee is fictitious or non-existing,' " clearly recognising the distinction.

It should be stated, however, that Lord Herschell, at p. 153, regarded the distinction as not involving any serious difference; but he seems to be referring rather to the argument (see p. 112) that *Petridi & Co.*, being existing persons, could not be "fictitious or non-existing persons." For he says, at p. 145, "Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. Where the payee is a fictitious or non-existent person means surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee." This could hardly apply to an impersonal payee. (Cf. *North and South Wales Bank v. Macbeth*, [1908] A. C., at p. 140.)

In the old case of *Grant v. Vaughan*, 3 Burr. 1516, where a draft on a banker was made payable to "ship *Fortune* or bearer," Lord Mansfield said: "there was no person originally named as the payee; it runs 'Pay to ship *Fortune* or bearer.'" Wilmot, J., said: "No

CHAP. VIII. person at all is named, it is 'Pay to ship *Fortune* or bearer.' "

A banker paying bearer on such a cheque might fairly contend that the customer must have intended him to pay bearer, as the cheque was obviously not capable of indorsement ; but there seems no good reason why the banker's position should be complicated or imperilled by the use of documents in this ambiguous and unreasonable form.

Such cheques do not come within any of the other statutes which afford protection to the paying or collecting banker, and unless falling within sect. 7, sub-sect. 3, are clearly not negotiable instruments.

A cheque payable to "Wages or bearer," "Petty cash or bearer," or in any such form where "bearer" is used instead of "order," is, of course, payable to bearer.

Cheque to
specified
person.

A cheque, "Pay A. B.," without the addition of the words "or order" or "or bearer" is, of course, negotiable by indorsement of A. B. under sect. 8, sub-sect. 4, of the Bills of Exchange Act.

Non-transfer-
able cheque.

If it is desired to draw a not transferable cheque payable to a specified person only, the word "order," or "bearer" must be erased or struck out and initialled by the drawer (cf. *ante*, p. 45), the cheque should be made payable to "A. B. only," and the words "not transferable" prominently written on the face of it horizontally, so as not to suggest a crossing, and initialled by the drawer. (Cf. sect. 8, sub-sect. 4 ; *Meyer & Co. v. Decroix, Verley & Co.*, [1891] A. C. 520 ; *National Bank v. Silke*, [1891] 1 Q. B. 435.) Presumably such a cheque cannot be crossed, as that would involve negotiation or transfer to a banker for collection.

A cheque payable to the order of A. B. is payable to him or his order at his option. (Sect. 8, sub-sect. 5.)

The common form of cheque "Pay self or order" is

justified by sect. 5, sub-sect. 1, "a bill may be drawn payable to or to the order of the drawer." CHAP. VIII.

A cheque drawn "Pay _____ order," indorsed by the drawer, would be a good cheque, the words being interpreted as equivalent to "Pay to my order." (*Chamberlain v. Young*, [1893] 2 Q. B. 206.) Cheques with no payee.

A cheque payable to "_____ or order" is a far more dubious instrument.

In 1811, in *R. v. Randall*, Russ. & Ry. 195, the whole of the judges, except Lawrence, J., sitting as court for Crown cases reserved, held that such a document was not a bill of exchange, inasmuch as there was no payee.

The question as to the effect of such a document was raised, but not decided, in *Chamberlain v. Young*, *ubi sup.*

Even if the decision of Kennedy, J., in *Daun and Vallentin v. Sherwood*, 11 T. L. R. 211 (*ante*, p. 33) be correct, it does not cover this case, because the use of the words "or order" negatives the idea of the cheque being payable to bearer.

In a case decided in the Scottish Court of Session (December 2nd, 1902), *Henderson v. Wallace and Pennell*, 5 Court of Session Cases, 166, a document in the form of a cheque, payable to "_____ or order" was given by three signatories to the bank on which it purported to be drawn. None of them had any account at the bank. The bank, by previous arrangement, gave two of them the amount of the cheque, and opened an account in which all three were debited with that sum. The Court held that all three signatories were severally liable to the bank for the amount of the cheque. The Lord Justice-Clerk said that the fact that the cheque was not filled in with the name of the payee made no difference, as the bank paying the money to the two signatories was, as holder of the cheque, entitled to

CHAP. VIII.

fill in its own name. Lord Trayner said that the signatories were rather in the position of makers of a promissory note. Each undertook payment to the payee or his order. The bank which advanced the money was the payee, and to that payee, being also the holder, payment must be made by each and all of the makers of it. This decision is not very clear, but was probably justifiable in the circumstances. Under sect. 20 the bank, being in possession of the cheque which was wanting in a material particular, had a *prima facie* authority, which on the facts was a real one, to fill up the omission in any way it thought fit. Under sect. 5 a bill may be drawn payable to, or to the order of, the drawee, and the bank might within reasonable time have inserted its own name as payee, when the cheque would have become payable to the bank. It does not appear, however, that it did so.

Anyway, the case does not cover that of a banker to whom a document in this form is presented for payment. He would probably act wisely in declining to pay it. He would seemingly not better his position by requesting the holder to fill in his own name as payee. So far as the Bills of Exchange Act goes, the authority to fill up a blank bill, given by sect. 20, is only a *prima facie* one; and to make the instrument enforceable against any person who became a party to it prior to its completion, it must be filled up in strict conformity with the authority given.

It is true that the general law of estoppel by delivery of a blank or incomplete negotiable instrument is now recognised as not superseded, but supplemented, by the Bills of Exchange Act (*Lloyds Bank v. Cooke*, [1907] 1 K. B. 794; *Smith v. Prosser*, [1907] 2 K. B. 735), and that by the recent judgment of the House of Lords in the *Macmillan Case*, [1918] A. C. 777, the operation of that estoppel is not confined to the payee or holder in

due course of a cheque, but extends in fitting cases to cover the bank who pays it. CHAP. VIII.

But it is doubtful whether the full force of such estoppel applies to all forms of completion of the instrument, and, now that the banker's right to decline to pay on ambiguous instruments is fully established, there seems no reason whatever why it should not be exercised in cases like this.

A cheque being a bill, the drawer is entitled to notice of dishonour, and, if this is not given or excused by circumstances, he is discharged from liability, both on the cheque and on the consideration for which it was given. (Bills of Exchange Act, sect. 48; *Peacock v. Pурсell*, 14 C. B. N. S. 728; *May v. Chidley*, [1894] 1 Q. B. 451.) Notice of dishonour of a cheque.

It is anomalous that the drawer of a cheque should be entitled to notice of dishonour, seeing that he is the party primarily liable, and has no remedy over against anyone.

In most cases, however, it would be excused. The dishonour of a cheque is generally caused either by there not being sufficient funds to meet it, or by payment having been stopped. In both of these cases sect. 50, sub-sect. 2 (c) dispenses with notice of dishonour.

As to notice of dishonour by collecting banker, see "Collecting Banker," *post*.

It is a common fallacy that if a cheque is issued unstamped any holder may affix and cancel an adhesive 2d. stamp. Sect. 34 of the Stamp Act, 1891, provides that the duty may be denoted by an adhesive stamp, which, when the cheque is drawn in the United Kingdom, is to be cancelled by the person by whom the cheque is signed, before he delivers it out of his hands, custody, or power. The proviso to sect. 38 entitles the banker to whom an unstamped cheque is presented for payment to affix and cancel a 1d., now 2d. [Finance Act, 1918, s. 36 (2)], adhesive stamp, as if he had Stamping unstamped cheques.

CHAP. VIII. been the drawer, and either charge the duty against the drawer or deduct it from the sum paid.

There is no power given anywhere to intermediate holders, and the wording of these sections excludes the implication of any such power.

In *Hobbs v. Cathie*, 6 T. L. R. 292, it was expressly held that a cheque which was issued unstamped, and stamped by an intermediate holder, was improperly stamped, and could not be recovered on, even by an innocent person who subsequently took it for value without notice of the defect. This seems unreasonable and ought to be remedied by legislation. It cannot affect the Revenue by whom the stamp is affixed.

Sect. 3.—Documents analogous to Cheques

Documents
analogous to
cheques.

Orders on
bankers.

The documents analogous to cheques, previously referred to, include the following :—

Orders for payment issued by a customer of a bank requiring as a condition of payment the signing by the payee of a particular form of receipt indorsed thereon or annexed thereto.

When this is a definite condition of payment, contained in the body of the instrument, addressed to and affecting the banker, such documents are not cheques. (Cf. *ante*, sect. 2.—Requisites in Form.) (*Bavins, junr., and Sims v. London and South-Western Bank*, [1900] 1 Q. B. 270 ; *London City and Midland Bank v. Gordon*, [1903] A. C. 240.)

Such documents are frequently made payable to order or even to bearer, but that would not appear to make them negotiable or even transferable. If they are not expressed to be payable to order or bearer, sect. 8, sub-sect. (4) of the Bills of Exchange Act does not apply, (a) because the document is not a bill, (b) because sect. 8 is not one of the crossed cheque sections, hereafter

referred to. That they are not negotiable even when expressed to be payable to bearer or to order is clear from the judgment of the Court of Appeal in *Gordon v. London City and Midland Bank*, [1902] 1 K. B., at p. 275.

They would not appear even to be transferable. As the receipt has to be signed by the named payee, if the document were payable to a third party, the incongruous result would accrue that the bank would be paying to B. money which A. had already acknowledged to have been paid to him in accordance with the order. This point appears never to have been raised, either by counsel or the Court in cases where it might have been, e.g. *Bavins and Sims v. London and South-Western Bank*, or the *Gordon Case*.

Probably not transferable.

Section 17 of the Revenue Act, 1883, extends the provisions of the crossed cheques sections, 76–82 inclusive, to “any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act contained shall be deemed to render any such document a negotiable instrument.”

May be crossed.

In *Bavins and Sims' Case* and in the *Gordon Case* in the Court of Appeal, *ubi sup.*, documents of this class were distinctly recognised as being brought within the crossed cheques sections by this enactment, though in each case circumstances deprived the bank of the protection of sect. 82, in the later case crediting as cash being the cause.

In *Gordon's Case* in the House of Lords, Lord Lindley ([1903] A. C., at p. 252) is reported as saying: “There remains only class 8, *i.e.* instruments drawn in favour of G. & M. and crossed, payable only upon signature by the payees of a form of receipt at the foot of the

Lord Lindley's dictum.

CHAP. VIII. instrument, and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act, nor, for reasons already given, are they brought within it by sect. 17 of the Revenue Act, 1883." And the other Law Lords assented to Lord Lindley's judgment, specially with regard to the various classes of documents involved, with which he alone dealt in detail. The only previous mention of the Revenue Act, 1883, in the judgment is at p. 250, where Lord Lindley had pointed out that it could not apply to bankers' drafts drawn by branch on head office, inasmuch as they were not issued by a customer of the bank but by the bank itself. That is, of course, not the case with documents of this sort, which are issued by a customer, and has no application to the position of a collecting bank, as in the *Gordon Case*, setting up the protection of sect. 82 by virtue of sect. 17 of the Revenue Act, 1883. The documents in question are clearly within the terms of that Act; and as various reports reproduce Lord Lindley's words in the same form, it can only be supposed that what he meant to say was to the same effect as the judgment of the Court of Appeal on the same point, namely, that though these documents were within the crossed cheques sections under sect. 17 of the Revenue Act, 1883, the bank had lost the protection of sect. 82 by reason of having credited them as cash.

Question as
to negotia-
bility.

This application of the crossed cheques sections by the Revenue Act, 1883, produces a curious contradiction. The Revenue Act distinctly treats these documents as being and, when crossed, remaining not negotiable instruments. If "not negotiable" is to be taken in the sense in which it is used in the Bills of Exchange Act, it means "not transferable." Sect. 8 (1) says: "When a bill contains words prohibiting *transfer* or indicating an intention that it should not be *transferable*,

it is valid as between the parties thereto, but is not negotiable." But since sects. 76, 77, and 81 are among the crossed cheque sections, it might be argued that under them the document is not negotiable until crossed "not negotiable," and when so crossed remains transferable "in like manner as if it were a cheque." It is submitted it is not so. The enacting section of the Revenue Act must override what it merely incorporates or applies, and the negative provisions of sect. 81 are not sufficient to establish negotiability in a case not really covered. At any rate, when the incorporating section is invoked by the banker, he must take it as a whole; and the words "intended to enable any person or body corporate to obtain payment" are utterly inconsistent with the idea of the document going beyond the person or body corporate who or which is obviously the specified payee. It is, however, to be noticed that both in *Bavins and Sims v. The London and South-Western Bank* and the *Gordon Case*, the crossed documents were taken by the collecting bank from a person other than the payee, by whom they purported it be indorsed or signed, and in neither case was any objection raised or point made in the judgments on this ground.

The real difficulty arises with regard to collection of these documents, and payment of them to the collecting banker. The importation of the crossed cheques sections authorises and, where made use of, necessitates the intervention of a banker. If the document is to order there must be indorsement to that banker, if to bearer negotiation to that banker, for a collecting banker is of necessity a holder.

The position is quite illogical, and must apparently be accepted and treated as such. The reasonable outcome seems to be that in the absence of any evidence or indication of negotiation to third parties by the payee, the collecting banker can collect, and the paying banker

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pay, these documents when crossed, as if they were really crossed cheques, and would each be entitled to the relative protection under the crossed cheques sections. A plausible, though doubtful, argument might be that the banker, in collecting, was acting purely as agent for the payee, and not as indorsee, and that the paying banker was justified in paying him in that capacity. Or it might be contended that such documents were treated as negotiable in *Bavins and Sims v. London and South-Western Bank*, and the *Gordon Case*, and therefore those cases are authority for that negotiability, which no doubt to a certain extent they are.

As to protection of banker paying.

Subject to the foregoing remarks, the bank paying such documents does not appear to be protected under sect. 19 of the Stamp Act, 1853.

With regard to this, all that Lord Lindley says in the *Gordon Case* ([1903], A. C., at p. 252) is, "Nor do they come within sect. 19 of the Stamp Act, 1853, which, as I have already observed, applies only to banks which are drawees." The documents in that case were not drawn on the defendant bank, and it would be too much to deduce from the above words that the section necessarily protects the bank on which such documents are drawn. The opposite appears to be the case. The section only applies to "drafts or orders payable to order on demand." If the documents are not negotiable they are not payable to order, and moreover are not capable of indorsement, against forgery of which the section alone affords protection. Moreover, where the signature of the receipt is made a condition of payment, that means an authentic signature, and the banker can only debit the customer where the receipt has been signed by the right person.

Another troublesome form of these documents is one in which the signature of the receipt is not made a condition of payment, so that the instrument remains a

cheque. It is made payable to order; then there is a note "The annexed receipt [or the receipt at back] must be stamped and signed before presentation for payment," and a further note, "This signature is intended for indorsement of the cheque as well as signature of the receipt," or "no further indorsement of this cheque is necessary."

It is submitted that this is not an effective indorsement. There is no legal authority that indorsement can be effected by a signature which concurrently fulfils another end. The "*animus indorsandi*" can hardly be predicated in such case. The idea seems opposed to sect. 32. No doubt the payee's indorsement of an order cheque may be utilised as a receipt, but that is an incidental matter, the debt has to be identified with the cheque and the payee's indorsement to give the latter this effect. It would seem, therefore, that such signature would not give the banker protection under sect. 60 if it proved to be a forgery. It would be far better if the note ran, "This cheque requires formal indorsement as well as signature of the receipt." Bankers usually decline to pay instruments of this class except under indemnity from their customers, but, as pointed out by the Secretary of the Institute of Bankers in a valuable article on the whole subject from the banker's point of view (*Journal of the Institute*, vol. 40, p. 310) it might very possibly turn out, when it was sought to enforce such indemnity, that it was *ultra vires* of the corporation or undertaking who gave it, and it is from such bodies that these documents most commonly emanate.

The receipt for such documents if for over £2, when executed, should bear an independent receipt stamp, not being within the exemption of sect. 9 of the Finance Act, 1895, of the name of the payee written upon a draft or order payable to order.

Yet another form sometimes adopted is a mere

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receipt as to the bank, with no payee's name, sent to the intended recipient, on signing which he can get the money from the bank. These documents may be within sect. 17 of the Revenue Act, 1883, though as before stated, "any person or body corporate" appears to point to a definite specified payee, but they are clearly not cheques, drafts, or orders on a banker, are not negotiable (see *Jones v. Coventry*, [1909] 2 K. B. 1029), and, if for over £2, they require two independent 2d. stamps.

Bankers' Drafts

Drafts drawn by a branch on head office of the same bank or *vice versâ* are not cheques or bills, there being no distinct drawer and drawee. (*London City and Midland Bank v. Gordon*, [1903] A. C. 240.) The decision of Bailhache, J., in *Ross v. London County and Westminster Bank*, [1919] 1 K. B. 678, to the contrary effect, is obviously wrong.

A banker's draft payable to bearer on demand would probably be an infringement of the provisions of the Bank Charter Act, 1844, ss. 10, 11, as explained by the Stamp Act, 1854, s. 11. The word "holder" in the latter section, which would primarily include the payee, must be read as synonymous with "bearer," and not as casting any doubt on the legitimate character of bankers' drafts payable to order on demand.

Bankers' drafts payable to order on demand are within the protection of sect. 19 of the Stamp Act, 1853 (*London County and Midland Bank v. Gordon*, [1903] A. C. 240), though for reasons previously stated (*ante*, p. 112, *sqq.*) this decision seems open to criticism.

In the same case (at p. 251) Lord Lindley referred to the doubt expressed in several of the text books whether this section applies to any except inland drafts or orders. Foreign bills, it is said, were not subjected to any stamp duty until the following year, 1854, and

Foreign and
inland.

the section, occurring as a proviso in a Stamp Act, can only be treated as applicable to documents chargeable with stamps under the Act containing it.

It is conceived that this is not so, and that the protection extends to all documents falling within its terms at the present day. The point is somewhat important; *Gordon's Case* having established that inland drafts issued by one branch of a bank on another, or the head office, fall within those terms, it is desirable that the protection should extend to the commoner case of such drafts drawn abroad on the head office in England.

The reasons for holding that it does so extend are as follows :—

(a) The fact that the section occurs in a Stamp Act is immaterial, it being perfectly general and self-contained in its terms.

(b) The fact that it is couched in the form of a proviso is not incompatible with its being a substantive enactment. (See *Matthiessen v. London and County Bank*, 5 C. P. D. 7); see, however, *R. v. Dibdin*, [1910] Probate, *per* Fletcher Moulton, L.J., at p. 125.)

(c) The fact that on the passing of the Bills of Exchange Act it was intentionally left unrepealed, of which judicial notice was taken in the *Gordon Case*, implies that it is applicable to drafts and orders in use at the present time, whether originally subject to stamp duty or not.

(d) If, as stated by Lord Lindley in *Gordon's Case*, the object of the enactment was to protect bankers against the increased use of order drafts on them, occasioned by the reduction of the stamp duty, and these documents fall within the definition, the protection would appear all the more necessary in the case of foreign drafts, which required, at the time, no stamp at all.

(e) Statutes are not to be confined to conditions existing at the date of their passing, if the wording

CHAP. VIII. is wide enough to include subsequent developments. (*A.-G. v. London Edison Telephone Co.*, 6 Q. B. D. 244.)

(f) In *Brown & Co. v. National Bank of India*, 18 T. L. R. 669, Bigham, J., in a case of a draft of this sort drawn in Madras on London, expressly stated that, but for the then existing ruling of the Court of Appeal in *Gordon's Case*, subsequently reversed, he should have held the document to be within this sect. 19 of the Stamp Act, 1853. The House of Lords, in *Gordon's Case*, referring to this decision, do not express dissent on the ground of the draft being foreign; but the question was not relevant to the drafts before them, which were inland.

(g) Stat. 35 & 36 Vict. c. 44, s. 11, refers to this section, and states that it "relates to the indorsement of drafts or orders drawn upon bankers for the payment of money" without any limitation as to their being inland drafts only.

Cannot be Crossed

Bankers' drafts cannot be effectively crossed. Under the successive Crossed Cheques Acts, 1856, 1858, and 1876, and until the passing of the Bills of Exchange Act, 1882, the document susceptible of crossing was "a draft or order on a banker payable on demand," the term being specially used in the first two Acts, and as the interpretation of "cheque" in the 1876 Act. On the construction put on the same words, when occurring in the Stamp Act, 1853, s. 19, by the House of Lords in the *Gordon Case*, they would include a banker's draft payable on demand. But the Bills of Exchange Act (s. 96) repealed the Crossed Cheques Act, 1876, which had itself repealed the previous ones; and in re-enacting the crossed cheques sections uses throughout the word "cheque," which it defines (sect. 73) as "a bill of exchange drawn on a banker payable on demand." As shown above, bankers' drafts are not bills, therefore, even when payable on demand, they

are not cheques, and therefore not within any of the existing crossed cheque sections. CHAP. VIII.

Lord Lindley's remarks at p. 250 of the *Gordon Case* might be read in the contrary sense ; but they are somewhat ambiguous ; and as the drafts in that case did not purport to be crossed and the bank was denied protection with respect even to ordinary crossed cheques, no weight can be assigned to the dictum.

Of course a draft drawn by one bank on another, so long as it is in cheque form, is an ordinary cheque and treated as such in all respects.

Dividend Warrants

Dividend warrants are frequently nothing more nor less than cheques in a somewhat unusual form, though it is by no means necessary, as was unsuccessfully contended in *Thairlwall v. Great Northern Ry.*, [1910] 2 K. B. 509, that a dividend warrant should be a cheque. If a dividend warrant contains any condition or feature excluding it from the character of a cheque, it must stand on its own footing. A dividend warrant, for instance, drawn payable to payee or bearer, but requiring to be countersigned by the payee, is not a cheque. Dividend warrants.

The negotiability of dividend warrants, as such, does not appear ever to have been judicially recognised (cf. *Partridge v. Bank of England*, 9 Q. B. 396 ; *Goodwin v. Roberts*, L. R. 10 Ex., at p. 354). Sir Mackenzie Chalmers seems to suggest (*Bills of Exchange*, 8th edit., p. 374) that dividend warrants fall within the general provisions of the Bills of Exchange Act unless excluded by special features. They could not do that unless they were bills or notes ; sect. 8, for instance, to which Sir Mackenzie Chalmers specially refers, is in terms confined to bills. The extension to dividend warrants of the crossed cheques sections by sect. 95 is more consistent with their being altogether outside the Act for other purposes than with their classification as cheques. Question of negotiability.

CHAP. VIII. Dividend warrants being thus entitled to the benefits of the crossed cheques sections, the argument above referred to with reference to orders for payment with receipt attached, as to the implication of negotiability from the application of the not-negotiable crossing, applies perhaps more forcibly in this case, where the sections referring to that crossing are applied by the Act itself. But it is submitted that negotiability has never been conferred by statute in such indirect and negative fashion. Sect. 97 (a) preserves "the validity of any usage relating to dividend warrants or the indorsement thereof." This clearly leaves the question of negotiability at large, and the section is probably only directed to the custom of bankers to pay dividend warrants which are payable to several payees on the indorsement of one. It seems however, very probable that dividend warrants have now acquired negotiability by custom of merchants, and that on evidence of such custom the Courts would recognise the fact.

Interest Warrants

The question has frequently been raised and vehemently debated whether the provisions of sects. 95 and 97 (a) extend to warrants for the payment of fixed interest, or are confined to dividend warrants strictly so termed; particularly whether a banker is justified in paying an interest warrant, payable to two payees or order on the indorsement of one of them, as he is in the case of a dividend warrant, by the usage preserved by sect. 97 (a). The controversy appears to have terminated, at least for the present, in favour of the negative view. (See Questions on Bankruptcy Practice, 7th edit., Question 987.)

And this is surely right.

There has been and is a widespread misapprehension or misuse of the term "Dividend warrant." Take for instance 5 per cent. War Loan 1929-1947, officially

designated as such. The holder receives from the Bank of England a document headed "Dividend warrant, 5 per cent. War Stock 1929-1947." Then follows the definition of the payment, "Half year's *interest* at 5 per cent." It is drawn by the "Chief Accountant" of the Bank of England, addressed "to the Cashiers of the Bank of England," crossed generally, and marked "not negotiable." There is a note, "Warrants outstanding more than six months after date must be sent to the Bank of England for verification." And the same or an analogous form is employed by any number of Governments, corporations, and companies for payment of fixed interest on loans, bonds, mortgage debenture stock and the like. Presumably these are all treated as pure dividend warrants; and if custom could abrogate the plain wording of a statute, a custom to so treat them could doubtless be proved, possibly at the time of the passing of the Bills of Exchange Act, more probably after. No doubt, where words are open to two constructions, such considerations may be accorded weight, but such is not the case here. The words used in sect. 97 are "dividend warrants and the indorsement thereof"; in sect. 95 "a warrant for the payment of dividend." It cannot be suggested that they apply to any but one class of document, whatever it may be, and the wording of sect. 95 is perhaps more forcible than that of sect. 97.

Again, it is said that, in 1882, the term dividend warrant was generally interpreted as including interest warrants. It is, no doubt, a rule of construction that words in an Act of Parliament are to be understood in the sense in which they were used at the time of its passing; but this cannot extend to impose upon a word a meaning essentially foreign to its plain grammatical and ordinary purport. If people in 1882 called an interest warrant a dividend warrant they can hardly have called it "a warrant *for the payment of dividend*."

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“ *Dividend* ” is and means a share of the fluctuating net profits of an undertaking, which, in the discretion of the directors, are divided among the shareholders, otherwise the proprietors of that undertaking, in proportion to their holdings. It is variable in amount, and the shareholder has no remedy if less is paid than he expects or even nothing at all. The principal of each holder is merged in the capital of the concern, is represented by so many shares or so much stock, and there is no debt due to him from the undertaking on which interest could accrue.

Interest is a periodical payment of money at a fixed rate in consideration of a loan or forbearance to enforce payment of a debt.

The person who subscribes to a War Loan or any other Government or corporation loan, or who takes or buys Government or corporation bonds or debenture stock in a company is in exactly the same position as any other creditor, or as a man who opens a deposit account with his banker. He simply lends his money at an agreed rate of interest. “ *Loan* ” is money lent ; “ *Bond* ” an obligation to pay ; “ *Debenture* ” a security for money owed.

The person so lending his money acquires no property or share in the concern, no right to share in the profits. If it be a company, and shareholders get a dividend of 50 per cent., he would not be entitled to a penny more than his stipulated interest of, say, 5 per cent. If the shareholders got nothing he would still have an enforceable claim for his 5 per cent. There is no question of anything being *divided* so far as he is concerned. If he buys his bonds, War Loan, or whatever it is from another person, instead of taking it up direct from the issuer, he simply takes an assignment of the debt and stands in the shoes of his transferor, or the original creditor.

In the face of these facts can it be maintained that a warrant for payment of interest is identical with or fairly described as a dividend warrant or a warrant for payment of dividend ?

In some cases, the method is adopted of making the interest warrant payable to one of the payees, identifying the account by stating on the face of it, "Account A. B., C. D., and E. F.," or as may be, A. B. being the specified payee. There the indorsement of A. B. is, of course sufficient for the banker.

Another form is "pay A. B. and another," on which the indorsement usually required is "For self and another A. B."

The effect of this depends a good deal on whether the interest warrant is in other respects a cheque or not ; whether it possesses all the features requisite in a cheque or any which disentitles it to that character.

If a cheque, sect. 7 (2) permits its being "made payable to two or more payees jointly, or it may be made payable in the alternative to one of two or one or more of several payees. Sect. 7 (1) provides that "where a bill is not payable to bearer the payee must be named or otherwise indicated therein with reasonable certainty." Singular includes plural, therefore where there are two payees, both must be named or indicated with reasonable certainty. Is "another" indication of a payee with reasonable certainty ?

Presumably the drawer knows who it is, because the name is on the books ; the named payee knows who it is, because he is jointly interested in the payment. It seems, however, rather stretching the meaning of "indicated with reasonable certainty" to import the private knowledge of these two parties. The banker who has to pay the cheque would know nothing of the "another's" identity. If, however, the identification is held sufficient, the form of indorsement "for self and

CHAP. VIII. another " might hold good, though here again it is not a usual one.

If these cheques were drawn payable in the alternative to one of two or more named payees, this would be clearly within sect. 7, and this does not seem more open to abuse than the course above described.

In many cases of dividend and interest warrants, sect. 17 of the Revenue Act, 1883, will be found to cover the situation. If, for instance, in the example above cited, it were held that it was not a cheque because one of the payees was not indicated with reasonable certainty or the indorsement was not a proper one, still, if the instrument was crossed, as such usually are, and was issued by a customer of the banker, as the majority are, there seems no substantial reason why it should not carry the protection of the crossed cheques sections. The instrument is a document issued by a customer of the banker and is clearly intended to enable a person, namely the named payee, to obtain payment from that banker of the sum named. The paying banker cannot be charged with negligence in paying it on such an indorsement as that cited above; if a second name were added, he would be in the dark as to whether it was that of "another" or not, and the indorsement of the named payee "for self and another" seems the most reasonable form to accept in the circumstances.

Reverting, for a moment, to the form of interest warrant for the 5 per cent. War Loan previously referred to, it should be noted that if it, or a similar form, has to be judged by the ordinary law of bills and cheques, it is entitled neither to the status of a cheque, a dividend warrant, or a document capable of being crossed under sect. 17 of the Revenue Act, 1883.

It is not a cheque because it is drawn by a representative of the bank on other officials of the same bank (cf. *Allen v. Sun Fire and Life Assurance Co.*, 9 C. B.

574); it is not a dividend warrant, because it is for interest not dividend; it is not within sect. 17 of the Revenue Act, 1883, because it is not drawn by a customer of the bank. The only protection would be against forged indorsement as a draft or order drawn upon a banker under the interpretation of sect. 19 of the Stamp Act, 1853, by the House of Lords in the *Gordon Case*. It is therefore not susceptible of crossing, or of being marked "not negotiable." Nor would a collecting banker get any protection from an ostensible crossing.

Orders by Local Authorities

The methods by which local authorities are constrained to receive and make payments under the control of the Ministry of Health, as successors to the old Local Government Board, have introduced an anomalous and somewhat hazardous type of instrument.

There may be minor differences in the procedure of the numerous and various bodies which come within the scheme of Local Government and it is only possible to deal with the more prominent and usual examples. It may be taken as common to all these bodies that they have to appoint a treasurer, who is to receive monies coming in, and by or through whom all payments are to be made. Such treasurer must be an individual, not a firm or a corporation. Throughout the Acts regulating the qualifications and liabilities of the treasurer, there are provisions and expressions only consistent with this. He is not to be a member of the Council, he is to give security; if he does not render proper accounts he may be liable to imprisonment, and so forth.

Glen's Public Health Act, p. 696, says: "It is necessary that some responsible individual should be appointed Treasurer, the Act is not satisfied by the appointment of a banking company as Treasurer."

In *In re West of England and South Wales District*

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CHAP. VIII. *Bank, ex parte Swansea Friendly Society*, 11 Ch. D. 768, Fry, J., basing his judgment on statutory directions, such as those above referred to, held that the bank, though it might become the banker of the society, could not be its treasurer.

There have been intimations from Government departments that corporations must not be treasurers, and that they will not sanction any such appointment.

As to payments by the local authority, an order of the Local Government Board quoted by Glen, p. 774, states that "the Board think that the preferable course is for the Council to pay all debts exceeding £2 by means of cheques drawn upon the treasurer in favour of the respective creditors, such cheques being handed to the creditors at a meeting of the Council or forwarded to them by the clerk."

In another order, cited by Glen at p. 696, the Board state that it is desirable that all orders of Urban District Councils upon the treasurers should be signed at a meeting of the Council by two at least of a duly authorised committee and countersigned by the clerk.

The Government exercise control over the form of these cheques or orders.

The original idea probably was that the treasurer should keep an account at a bank, that orders should be drawn upon him, and that he should pay the amounts by cheque drawn on his own account.

That method does not appear to have been adhered to. Departure from it seems indicated by the reference to "cheques drawn upon the Treasurer" in the Local Government Board order above referred to, and by the use of the word "cheque" in the authorised form of order.

The usual method adopted seems to be as follows :

A bank manager or other bank official is appointed treasurer and an account kept at his bank in his name.

Rate collectors and other officials pay in money

received by them to this account. The orders for payment are drawn by the Council of the local authority direct on the treasurer, on the form prescribed or approved by the Government, and are handed or sent to the creditors. The creditors present them direct to the bank, nominally to the treasurer, and, if in order, they are paid, usually on signature of a specific attached receipt. The Government will not sanction their being made payable otherwise than to order. The typical direction is : " To _____, Esq., Treasurer at the A. B. bank." A note runs : " The Council request that this *cheque* may be presented, etc. . . . This *cheque* requires indorsement."

Such a document is not a cheque ; it is not drawn on a banker—so held in *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183.

It is not within sect. 19 of the Stamp Act, 1853, for the same reason.

It is not within sect. 17 of the Revenue Act, 1883, because it is not issued by a customer of a banker and intended to enable payee to obtain payment from that banker.

If it is a negotiable instrument, it can be only as a bill. Any crossing thereof is a nullity, since there is nothing to bring it within the crossed cheques sections.

In case of forged indorsement, the treasurer can only charge the Council where the account has been kept at the bank and in the manner it was by the order or adoption of the Council, and where the document is such that, if drawn on the bank, that bank would have been protected by statute. (See *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183 ; cf. *Colchester v. Moy*, 68 L. T. 564 ; *Cosford Union v. Grimwade*, 8 Times L. R. 775.)

Position of
treasurer.

With regard to the true owner the only position the treasurer could take up would seem to be this. He is not liable on the instrument. He has converted it.

CHAP. VIII.

He is not liable for money had and received ; he has not received, he has paid it. He could tender the order back to the true owner, offering to annul cancellation of drawers' signatures, if they have been cancelled. This he is entitled to do, as having been cancelled by mistake (sect. 63 (3)). He should then pay the instrument on presentation, with any nominal damages, and, having paid the right man, he is entitled to charge the Council. As to the first payment under the forged indorsement, he would be entitled to charge that, under *Halifax v. Wheelwright, ubi sup.*, if the facts were as in that case. If the local authority had stopped payment he could tender the instrument to the true owner with the cancellation annulled, dishonour the instrument on presentation, and leave the true owner to sue the local authority, the instrument not having been discharged under sect. 60, because not drawn on a banker.

Some authority for the above view of the treasurer's position with regard to the true owner may be derived from *Lovell v. Martin*, 4 Taunt. 799, and *Charles v. Blackwell*, L. R. 2 C. P. D. 151, at p. 159.

Position of
bank.

The bank which keeps the account does not seem to incur risk.

If the treasurer has drawn a cheque, things follow the normal course. If he has not drawn a cheque, the order has, in all probability, been paid according to his orders. It might plausibly be contended that the bank had really nothing to do with the matter at all ; that they placed certain members of the staff at the disposal of the treasurer, who acted as his and not their agent in making the payments.

The Council could have no claim against the bank for having paid contrary to orders ; the order is addressed not to the bank but to the treasurer. The bank has not converted the instrument ; if anybody has, it is the treasurer.

The collecting bank is in the worst position of all. There is no protection under the crossed cheques sections,

and as *ex hypothesi* the indorsement is forged, the collecting banker could never be holder in due course.

A good deal of the danger to all parties would be avoided if these instruments could be made payable to bearer and kept free from anything affecting their unconditional character.

Post Office Money Orders

Post Office money orders are not now negotiable instruments. (*Fine Art Society v. Union Bank of London*, 17 Q. B. D. 705.)

By the Currency Act, 1914 (4 & 5 Geo. V., c. 14, s. 1 (6)), it was enacted that "Postal orders issued either before or after the passing of this Act shall temporarily be current and legal tender in the United Kingdom in the same manner and to the same extent and as fully as current coins and shall be legal tender in the United Kingdom for the payment of any amount."

This was emergency legislation, and was repealed by Proclamation as from February 3, 1915. The Post Office Act, 1908, s. 25, contains a misleading statement. "A banker collecting a postal order or document purporting to be a postal order for any principal shall not incur liability to anyone but that principal by reason of having received payment of or presented such order or document for payment." It specifies that this is not to discharge the principal from liability.

There is no condition that the postal order or document shall have been crossed, and the banker might not unnaturally conclude that if he collected the postal order for a customer and credited him with the proceeds he was free from all liability. Such, however, is not the case, as is shown by *London and Provincial Bank v. Golding*, in the Court of Appeal, March 1, 1918. (*Journal of the Institute of Bankers*, vol. 39, p. 136.)

In that case a customer paid into the bank some postal orders which had been negotiated to him by a

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Chinese, asking the bank to advise him as soon as they were "all right." The bank received the proceeds and advised the customer to that effect. An irregularity was discovered by the Post Office, who returned the orders to the bank, who debited the customer. The customer refused to be debited, and the bank sued him. It was shown that the regulations of the Post Office give them the right at any subsequent period to return such orders to the presenting bank, should they be found irregular, and deduct the amount from any payment due or which may become due to the bank. Judgment for the bank.

The Institute of Bankers recommend that it should be pointed out to customers paying in these instruments that payment thereof is provisional and that the Post Office has a right to demand a subsequent refund in case of irregularity being discovered.

The above-quoted section should at least afford the collecting banker protection against the true owner, whether the postal order be crossed or not. The section reproduces the proviso to sect. 3 of the Post Office (Money Orders) Act, 1880, incorporated with the Post Office (Money Orders) Act, 1883. While that Act was in force, the true owner recovered from the bank in *Fine Art Society v. Union Bank of London*, 17 Q. B. D. 705, but no reference to or mention of this statutory provision appears in that case.

Circular Notes

Circular
notes.

Circular notes are not in themselves negotiable instruments. When the draft which constitutes part of them is duly filled up and signed, it depends on the form in which it is expressed whether it amounts to a bill, a cheque, a draft on a banker, or a document within sect. 17 of the Revenue Act, 1883 (*Conflans Quarry Co. v. Parker*, L. R. 3 C. P., at pp. 8, 13): "Pay to the order of the bearer named in the letter of indication,"

the form of the notes in *Rhodes v. London and County Bank*, Journal of the Institute of Bankers, vol. i. p. 770, would preclude the instrument from being a bill or cheque, the payee not being indicated therein with reasonable certainty. CHAP. VIII.

On the form and circumstances must depend the applicability of crossing and the protection of the banker against forged indorsement.

It is not incumbent on the person to whom circular notes are issued that he should cash all or any of such notes. He may return them or any of them to the banker, provided he at the same time returns the letter of indication, and may claim to be reimbursed or credited with the amount of the unused notes. (*Conflans Quarry Co. v. Parker*, L. R. 3 C. P. 1.)

The conditions on which circular notes are issued, e.g. as to keeping notes and letter of indication apart, constitute a contract between the issuing bank and the person to whom they are issued ; and breach of such conditions may preclude the latter from claiming against the bank, where the loss arose from such breach. (*Rhodes v. London and County Bank*, Journal of Institute of Bankers, vol. i. p. 770 ; *Hume Dick v. Herries Farquhar & Co.*, 4 T. L. R. 541.)

The correspondent cannot recover against the issuing bank any money paid on a note to which the drawer's name has been forged, notwithstanding that the letter of indication, genuinely signed by the holder, was produced at the time of payment. (*Conflans Quarry Co. v. Parker, ubi sup.*) Such correspondent's claim in any case only rests on the request to honour or cash the draft, inasmuch as being payee thereof he could not claim against the issuing bank. And such request only extends to drafts really signed by the person named in the letter of indication. But if the signature be authentic, it is not essential to the correspondent's recovery that the letter of indication should have been produced to him before payment.

CHAPTER IX

CROSSED CHEQUES

For forms of, and general law as to, crossed cheques, see Bills of Exchange Act, 1882, sects. 76–82, and Chalmers' Bills of Exchange.

Effect of
crossing.

Apart from the non-negotiable crossing, none of the authorised forms of crossing has any effect whatever on the negotiability of the cheque. There is a common superstition that the fact of a cheque being crossed generally or specially, in some way puts a person taking it on notice of possible defects of title in his transferor; that there is some difference in the position of a holder in due course where the instrument is a crossed cheque.

Possibly the error is in part traceable to the language attributed to Lindley, J., in *Matthiessen v. London and County Bank*, 5 C. P. D. 7, and repeated in *Gordon v. London County and Midland Bank*, [1902] 1 K. B., at p. 266.

The learned judge is made to say (5 C. P. D., at p. 16), "The customer of the bank gets no better title than his transferor, not only when the cheque is marked 'Not negotiable,' but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer has no better title than the person from whom he took it."

Now what his lordship was dealing with was a cheque marked "Not negotiable," which he had just described as a new-fashioned cheque altogether, and the proceeds of such a cheque.

Reference to the errata at the beginning of the

volume (5 C. P. D.) will show at once that the passage should read thus: "The customer of the bank gets no better title than his transferor. Not only when the cheque is marked 'Not negotiable,' but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque it may be stopped in their hands. The customer has no better title than the person from whom he took it."

The statement as to the customer's title obviously, therefore, only applies to the "Not negotiable" crossing.

In *Smith v. Union Bank of London*, 1 Q. B. D. 31, the Court of Appeal (Lord Cairns, C., Lord Coleridge, C.J., Bramwell and Brett, JJ.) say, with regard to a crossed cheque under stat. 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79: "The Legislature might have enacted that any one taking a crossed cheque should take it at his peril and get no better title than his transferor had. It has not done so. We cannot say that it has by implication restrained the negotiability of the cheque." Again, they say, "Have the statutes restrained the negotiability of the cheque? It is impossible to hold they have. There is not a word in them to that effect."

The Crossed Cheques Act, 1876, was passed the year after this judgment, and introduced the "Not negotiable" crossing.

The Bills of Exchange Act, 1882, repealed and re-enacted all the above-mentioned Acts; and, as the Court of Appeal said with regard to the earlier statutes, there is not a word in it affecting the full negotiability of a cheque crossed but not bearing the words "Not negotiable."

The introduction of the "Not negotiable" crossing is the strongest possible evidence that the other crossings have not the same or any analogous effect.

Apart from the "Not negotiable" crossing, the whole purview and scope of the crossed cheques sections are for

CHAP. IX. and against bankers and bankers only, affording through them a safer method of drawing cheques for the public.

The "Not Negotiable" Crossing

The "Not negotiable" crossing is often misunderstood, many people believing that a cheque so crossed is not transferable, but payable only to the payee through his banker. Even Lindley, L.J., in *National Bank v. Silke*, [1891] 1 Q. B. 435, uses words which might be so interpreted. "Not negotiable" usually does mean not transferable (see Bills of Exchange Act, 1882, s. 8, sub-s. 1); and it is only by reference to sect. 81 that the true effect of the crossing is arrived at. That effect is that the cheque remains transferable, but is deprived of the full character of negotiability. However honestly and for value a transferee may take it, he cannot acquire any better title to the cheque or its proceeds, or any better right against any prior party to it, than his transferor had. So long as there is no defect of title, or failure of consideration, the cheque may pass from hand to hand just as if it was an open cheque, and each successive holder acquires full rights and title thereon. A cheque crossed "Not negotiable" is, in fact, as Sir Mackenzie Chalmers says, "on much the same footing as an overdue bill." Its status is defined on the above lines by Vaughan Williams, L.J., in *Great Western Railway Company v. London and County Bank*, [1900] 2 Q. B., at p. 474; and the House of Lords, though reversing the decision of the Court of Appeal on other grounds, take the same view on this point. ([1901] A. C. 414.)

The crossing operates equally whether a holder is suing on the cheque, or whether the true owner is suing a transferee for conversion and money had and received.

Prior to, and in, this case of *Great Western Railway Co. v. London and County Bank*, it was sought to establish a distinction between the cheque and its proceeds. It

Affects
cheque and
proceeds.

was contended that sect. 81 in terms only affected the title to the cheque, and that, therefore, if an innocent holder of such a cheque obtained the proceeds he could hold them as against the true owner of the cheque.

The House of Lords, however, put the rational interpretation on the section :

“ The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory. The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money.” (Lord Halsbury, C., [1901] A. C., at p. 418.)

“ Every one who takes a cheque marked “ Not negotiable,” takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself.” (Lord Lindley, *ib.*, at p. 424.)

Nor does it matter whether the defect of title be such as to render the cheque void or merely voidable.

And whether
title void or
voidable.

“ Whether the cheque was void or only voidable appears to me really immaterial. Be it void or be it voidable, it was not negotiable ; and, by sect. 81 of the Bills of Exchange Act, 1882, Huggins was not capable of giving a better title to the cheque than he had himself.” (Per Lord Lindley, *ib.*, at p. 424.) When the holder is suing on the cheque, this is clear. But Lord Lindley was dealing with a case where the true owner was suing a virtual transferee for value of the cheque for conversion of it and money had and received, and the holding this crossing destructive in such case of all distinction between void and voidable settled a previously doubtful point.

Where a fully negotiable instrument, such as a bill, is, by reason, say, of the circumstances under which it has been obtained, voidable but not void, even the person who

Property in
voidable bill.

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has so obtained it has a temporary revocable property in it. If, prior to its revocation or repudiation, an innocent third party takes the instrument as holder for value, or even without value, subsequent revocation or repudiation cannot affect his rights or fix any liability upon him. (*Tate v. Wilts and Dorset Bank*, reported only in *Journal of the Institute of Bankers*, vol. xx., p. 376. As to the respective states of circumstances which render a negotiable instrument void or only voidable, see *post*, p. 280.)

Voidable
cheque
crossed "Not
negotiable."

But where the voidable instrument is a cheque crossed "Not negotiable," this distinction between void and voidable is swept away. The revocation and repudiation relate back, so to speak, to the date at which the true owner temporarily parted with the property.

However many hands the cheque may have passed through, the ultimate transferee, even if otherwise a holder in due course, cannot, as against the true owner, assert any right or title to it or the proceeds, or defend any action for conversion or money had and received. The true owner, on revocation, is put in precisely the same position with regard to him as if he had never parted with the property. Whether, and, if so, how far, this doctrine extends to others than transferees; whether it renders liable for conversion or money had and received all persons who have dealt with the cheque or its proceeds in the interval prior to revocation in the case of a voidable cheque, is a question which will be dealt with under the head of "Conversion—Money had and received."

"Not negotiable" must be combined with crossing.

The words "Not negotiable" have no statutory effect unless combined with one of the regular crossings. Under sect. 76, the "additions" which constitute a recognised crossing are (a) the words "and company" or any abbreviation thereof between two parallel transverse lines; (b) two parallel transverse lines simply; (c) the name of a banker.

Inasmuch as any one of these additions is declared to constitute a crossing without, as well as with, the words "Not negotiable," it is obvious that it is the addi-

tion as above defined which constitutes the substantive crossing. Then sect. 81 enacts that "when a person takes a crossed cheque which bears on it the words 'Not negotiable' he shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had." Here not only are the words "Not negotiable" treated as being separate from and extraneous to the crossing, but the effect of the section is made dependent on the cheque being a crossed cheque apart from the existence thereon of these particular words. There is absolutely no provision in the Act for the words "Not negotiable" without one of the recognised crossings, and as all the crossed cheques sections for the protection of the banker are confined to crossed cheques, neither paying nor collecting banker obtains any protection, either under the Bills of Exchange Act, or the Amending Act of 1906, with respect to a cheque bearing the words "Not negotiable" apart from a real crossing.

If the cheque be payable to order or bearer, the words "Not negotiable" by themselves written on it have no effect in hindering its full negotiability (see *ante*, p. 132). It would, moreover, be altogether incongruous to accord to those words, without a crossing, the effect conferred on them by statute when used in conjunction with a crossing.

There is nothing in the Bills of Exchange Act requiring the words "Not negotiable" in order to be effectual to be between the two parallel transverse lines of a crossing. In sect. 76 (1) (a) "with or without the words not negotiable" seems more properly to be read with the words immediately preceding, viz. "two transverse parallel lines," than with "and company or any abbreviation thereof," denoting that it is only the latter which must be between the lines. In 76 (1) (b) there is no mention of anything at all being between the lines. "Transverse lines with or without the words not negotiable" is equally fulfilled whether the words, when used, are

Position of
"not nego-
tiable."

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between the lines or not. In the case of specially crossed cheques, transverse parallel lines are not necessary, and, if added, are purely superfluous. The sub-sect. 76 (2) does not prescribe them, and under sect. 77 a holder is empowered in the case of a cheque crossed generally before coming to his hands, not to add the name of a banker, but to cross it specially. When he writes across it the name of a banker, whether between the existing lines or not, that special crossing supersedes the general one altogether. So that in the case of the special crossing there are no transverse parallel lines within which to put the words "Not negotiable."

The analogy of these two sub-sections is further ground for interpreting "with or without the words not negotiable" in sect. 76 (1) (a) in the same sense.

"Bears on it."

Sect. 81 does not even prescribe that the words shall be on the face of the crossed cheque. It merely says "bears on it." It is submitted, however, that, to constitute an effective "Not negotiable" crossing, the words must be in some reasonable relation and collocation to the recognised crossing. It can hardly be contended that sect. 81 would be satisfied by the crossing being on the face of the cheque, and "Not negotiable" on the back. A bearer cheque may be crossed "Not negotiable" with full effect, and it would be manifestly unreasonable if an innocent taker for value were to be held to have his title defeated by the existence of the words in a position where he had no reason whatever to suspect or look for them. And if "bears on it" must be interpreted "bears on the face of it" in this case, it must be equally so in the case of an order cheque. Then, assuming this, the words "with or without" in sect. 76 and "may add" in sect. 77 (4) appear to point to the words, when used, being in some relation or connection with the authorised crossing, not as is sometimes the case, printed across the extreme edge of the cheque, while the crossing is in or near the middle.

It was suggested by Lord Brampton, in *Great Western Railway Co. v. London and County Bank*, [1901] A. C., at p. 422, that the fact of a cheque being crossed "Not negotiable," in the regular way, deprived a banker collecting it for a customer of the protection of sect. 82, or at least imposed some additional duty or precaution on him. This suggestion was not adopted in the *Gordon Case*, or accorded much weight by Pickford, J., in *Crumplin v. London Joint Stock Bank*, 30 T. L. R. 99. It was hoped, therefore, that the matter was settled. Unfortunately, there are some disquieting *dicta* by Lord Reading, Ld.-C.J., in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, as to "not negotiable" having some influence on the question of negligence.

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Question of effect, if any, of "Not negotiable" crossing on collecting banker.

This question is dealt with more fully hereafter under the head of "Collecting Banker."

Account Payee

Words such as "account payee," "account of A.B.," are frequently added to the crossing of a cheque.

They are in no way authorised or recognised by the Bills of Exchange Act. Indeed, where, as is usual, they are included within the transverse lines and incorporated with the crossing, it has been suggested that they invalidate the cheque, or the crossing, or are at least illegal under sect. 78, which enacts "a crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing."

These words, however, do not constitute an addition such as is contemplated by the Act. Such an addition must be one effective under the statute, if made by the proper person; whereas these words are more in the nature of a memorandum. (*Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465.)

National Bank v. Silke, [1891] 1 Q. B. 435, shows that

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such an addition to the crossing does not prevent the cheque from being transferable. In the judgments in that case the terms transferable and negotiable are, unfortunately, used somewhat indiscriminately, and no direct authority can be deduced as to the effect, if any, of such words on the negotiability of the cheque. It may be noticed, however, that the defence was based on the allegation that the cheque had been obtained by false representations and that the plaintiffs were not holders for value in due course. The defendant, who, it is to be assumed, proved the false representations, would have been entitled thereon to judgment equally whether the cheque was not transferable or only not fully negotiable; and from the fact that the Court of Appeal affirmed the judgment in favour of the plaintiffs, it may be presumed that they did not consider the full negotiability of the cheque to have been in any way affected.

Another ground for holding this to be the correct view is that, if such words had the effect of limiting the negotiability of the cheque, the result attained by their use would be precisely equivalent to that of the "Not negotiable" crossing; and it is not permissible to attribute to one set of words the effect exclusively attached by statute to another set. Again, if the cheque be a negotiable one in its origin, that is, payable to order or bearer, words prohibiting transfer, or indicating an intention that the cheque shall not be transferred, are ineffectual to restrain either its transferability or negotiability. (See *ante*, p. 133.) As a matter of fact, it has never, of recent years, been seriously contended that the words "account payee" have any effect on the negotiability of a cheque.

As to the bearing of these unauthorised additions to the crossing on the paying and collecting banker respectively, see under the headings "Paying Crossed Cheques" and "The Collecting Banker."

It may, however, be briefly stated here that, apart from the possible question of the duty of the paying banker where these words are found together with obviously inconsistent indorsements, the words only constitute a direction to the collecting banker signifying the account to which the proceeds of the cheque when received are to be placed, which he disregards at his peril. If received by that banker for anyone other than the customer indicated, such receipt is not "without negligence," and precludes the banker from the protection of sect. 82 (*Bevan v. National Bank*, 23 T. L. R. 65; *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356), even though the crossed cheque be payable to "A. B. or bearer." (*Per Rowlatt, J., House Property Company of London v. London County and Westminster Bank*, 84 L. J. K. B. 1846.) It is anomalous that this power should be in the hands of a person such as the drawer, or a previous holder, who is in no manner of relation to the collecting banker, and the exercise of which is counterbalanced by no correlative safeguard to the collecting banker, as in the case of an ordinary crossing. Bankers have only themselves to blame for the present prevalence and legal recognition of this excrescence on the crossed cheque and the consequent extra trouble and risk it brings to them. There were feeble efforts to introduce it many years ago, which might easily have been suppressed by treating the cheque as abnormal or ambiguous and so reliable to return; and now any number of applications for payment require that, if the money is remitted by cheque, the cheque must be crossed in a particular way and further that it be marked account payee or account so and so. In order that posting the cheque shall be good payment it is necessary that these requirements be strictly complied with. Thus the practice has grown, and in face of this and the decisions it would be

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futile to contend that the collecting banker could deal with a cheque so marked otherwise than for the account indicated, while, as above mentioned, doubts have been suggested as to the position even of the paying banker in relation thereto. A new form has recently appeared in requisitions for payment, namely, that cheques are to be marked "account payee only." The cheque in *Sutters v. Briggs*, [1922] A. C. 1, was so marked. Whether a cheque so marked has any further or other significance than one marked simply "account payee" may have to be considered some day if it become the custom so to mark a cheque.

Crossing by
unauthorised
person.

A question, theoretical perhaps rather than practical, as not of likely occurrence, and so not treated earlier in this chapter, arises from the respective definitions of crossed cheques and of the persons entitled to cross them.

Premising that the only protection to a banker, whether paying or collecting, apart from sect. 60, which only touches the case of the former, depends on the instrument being a crossed cheque within the meaning of the Act, we find that sect. 76 provides that "where a cheque bears across its face an addition of" certain things, "that addition constitutes a crossing, and the cheque is crossed" specially or generally, as the case may be.

Sect. 77 provides that a cheque may be crossed generally or specially by the drawer, or crossed or the crossing added to by the holder.

Sect. 78 provides that a crossing authorised by the Act is a material part of the cheque, and that it shall not be lawful for any person to obliterate, or, except as authorised by the Act, to add to or alter the crossing.

A holder is defined by sect. 2 as the payee or indorsee of a bill who is in possession thereof, or the bearer thereof.

The question is whether, so far as the banker is concerned, a cheque is a crossed cheque where it ostensibly bears on its face a crossing when it reaches the banker,

but that crossing has been put on by someone who was not drawer or holder. CHAP. IX.

For instance, the person innocently in possession of an open order cheque under a forged indorsement might in form cross it, but he would not be within the authorisation of the Act, being neither drawer nor holder, not being in fact, indorsee.

The arguments in favour of the broad construction, viz. that, as far as the banker is concerned, any cheque is a crossed cheque which, when it comes to him, purports to be crossed, seem to be as follows :— Arguments.

(a) The words in sect. 76, “ bears across its face,” are consistent with, and designed to include, a merely ostensible crossing. (Cf. *Simmons v. Taylor*, 4 C. B. N. S. 467.)

(b) It is obviously impossible for the banker to know by whom a crossing is put on.

(c) The proviso to sect. 79 contemplates only the ostensible state of the cheque when it reaches the paying banker.

(d) On any other construction, the anomaly would ensue that a thief in possession of a bearer cheque could effectively cross it, while an innocent person in possession under a forged indorsement could not.

(e) That the prohibition of sect. 78 is confined to alteration of or addition to an existing crossing. See also the Forgery Act, 1913, s. 1 (2) a and (3) c.

(f) That the Crossed Cheques Act, 1876, confined the right of crossing to “ a lawful holder,” and that the omission of the word “ lawful ” in sect. 77 implies a liberal interpretation of “ holder.”

(g) That in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465 ; 20 Times L. R. 564, Bigham, J., treated the collecting banker as a “ holder ” entitled to cross the cheque, notwithstanding the payee’s indorsement was forged. Probably, however, this was the

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result of an oversight: the bank could not possibly be a holder in the circumstances.

The opposite argument, viz. that the crossing must be by the drawer or a holder, would be as follows:—

(a) The contiguity of sects. 76 and 77 requires that they be read together, and the whole scheme of the sections is based on the crossing being authorised by the Act.

(b) On any other construction sect. 77 has no meaning.

(c) Any other construction enables a mandate to be imposed on the paying banker by a person not having authority as customer, or derived from the customer by virtue of the statute.

(d) Any other construction legitimises a material alteration by a stranger, which would otherwise invalidate the cheque. This would be extraordinary in the case of the not-negotiable crossing, as there the essential character of the cheque is affected. The words in sect. 81, “bears on it,” are equivalent to those used in sect. 76.

(e) If the face appearance of the cheque is the test, the proviso to sect. 79 is unnecessary.

(f) That in *Akrokerri, &c., v. Economic Bank*, argument and judgment alike turned solely on the question whether a “holder,” as distinguished from a “holder for value,” was entitled to cross, and the question of forged indorsement was not dealt with or considered in this connection; probably was overlooked.

For the bearing of this question on the position of the paying banker, see “Paying Crossed Cheques.”

For its bearing on the liability or protection of the collecting banker, see “The Collecting Banker.”

As to crossing orders for payment under sect. 17 of the Revenue Act, 1883, *ante*, p. 146, and as to Dividend and Interest Warrants, *ante*, p. 159.

Position of
banker.

Crossing
other
documents.

CHAPTER X

CROSSING BY COLLECTING BANKER

THE power of crossing cheques given to a "holder" is not confined to a holder for value. The collecting banker is a "holder," and, apart from the special powers given him under sect. 77, may exercise the powers of crossing of a holder, such as that of converting a general into a special crossing, or crossing an open cheque generally. When the cheque is in a condition to be endorsed specially there seems no reason why the banker holder should not, simply as holder, cross it specially to himself. (*Sutters v. Briggs*, [1922] A. C. 1.) But however the banker exercises his power of crossing, he can never, by so doing, acquire protection under sect. 82 in respect of a cheque coming to his hands uncrossed. (See *post*, p. 184.) Special rights are conferred on the collecting banker by the Bills of Exchange Act, s. 77, sub-ss. 5, 6.

Sub-sect. 5. Where a cheque is crossed specially the banker to whom it is crossed may again cross it specially to another banker for collection.

Sub-sect. 6. Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

The crossing under sect. 77, sub-sect. 5, is the one referred to in sect. 79, the exception to the rule that a banker must not pay a cheque crossed specially to more than one banker.

It is not uncommon for cheques to be presented for payment crossed to two branches, or a branch and the head office, of the same bank, the cheque having been

Crossing
between
branches.

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transmitted from one to the other for convenience of collection. The second crossing does not seem to fall exactly within either sub-section. It is hardly a crossing "to another banker," because for most purposes the head office and all branches constitute only one bank; and it cannot be justified under sub-sect. 6, inasmuch as the cheque was not, in the first instance, "uncrossed or crossed generally," but specially.

But the objection seems to be met by the consideration that if sub-sect. 5 does not apply, sect. 79 must be read in the same sense, and the paying bank, in paying such a cheque, would not be paying it crossed to two bankers, but only one.

Conversely, if the bankers are to be treated as two under sect. 79, the second crossing is to another banker for collection within sub-sect. 5.

One bank
employing
another for
collection.

The system of one bank employing another for collecting purposes, recognised by this sub-sect. 5, suggests some curious questions:—

Suppose a cheque, crossed specially to bank A., is paid into that bank for collection by a customer who has no title to it, payee's indorsement having been forged.

Bank A. specially cross it again to bank B. for collection.

Bank B. collect it and transmit the proceeds to bank A.

Bank A. is protected as against the true owner under sect. 82. (*Akrokkerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465.)

The true owner gets hold of the paid cheque, and discovers from the second crossing that it was presented by bank B.

Bank B. are at least equally guilty with bank A. of conversion of the cheque; and it is difficult to see how they are entitled to protection under sect. 82, inasmuch as they did not receive payment for a customer, the

customer being bank A.'s, not theirs, and the *quasi* obligation to collect, which is the foundation of protection, not applying in their case.

Sect. 82 only contemplates and provides for the simple case of one bank receiving a crossed cheque for collection from a customer and collecting the proceeds directly itself. (See *Gordon's Case*, [1902] 1 K. B., at p. 262 ; [1903] A. C., at p. 246.) Sect. 77, sub-sect. 5, sects. 79 (1) and 80, on the contrary, contemplate employing another bank as agent for collection. Bank B. would in all probability be entitled to indemnity from bank A., either on the ground that it was acting as agent of the latter, or on the ground that it had done an act lawful in itself at the request of bank A., whereby it had suffered loss, or that bank A. had represented the title to the document as good or agreed to indemnify bank B. if it were not. Sect. 82 only protects bank A. against the true owner, not anybody else.

In the example supposed, a second special crossing has been introduced, but this does not affect the main question ; and the same difficulty might arise in every case where the collection of a crossed cheque is delegated by one bank to another.

It may be presumed there is some answer to the suggested danger, as it appears unreasonable that a bank, by availing itself of a necessary and recognised course of business, should indirectly incur liabilities equivalent to those it was the object of sect. 82 to remove, or that the bank, whose employment seems recognised by sect. 77, sub-sect. 5, should not be directly protected against the true owner ; but the answer is not at present obvious. Possibly it lies in extending the term "customer" to bank A., by a liberal interpretation of the term, assisted by the use of the word "collection" in sect. 77, sub-sect. 5, and the account which would necessarily exist between banks A. and B.

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Transmission
between
branches.

Banker
crossing a
cheque to
himself under
sect. 77,
sub-sect. 6.

The case of a bank transmitting a crossed cheque to another branch or the head office is not open to the same objections. There the whole system would be treated as one bank, and the protection of sect. 82 would enure through all stages of the operation of collection.

“Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.” (Sect. 77, sub-sect. 6.)

It has been contended that this section enables a banker by crossing a cheque sent to him uncrossed for collection to obtain the protection of sect. 82.

It has been stated on good authority that the sub-section was specially introduced into the Act for this purpose. (See Questions on Banking Practice, 7th edit., Question 335.)

It has been suggested that the word “sent” pointed to this being the true interpretation; as, in cases where the cheque was “brought” by the customer, the banker could get him to cross it, which he could not do when it was sent, and he was therefore allowed to do it himself.

But this view of the sub-section cannot be maintained.

It was conclusively rejected in *London, City and Midland Bank v. Gordon*, [1902] 1 K. B. 273; [1903] A. C. 240.

If the Legislature had any such intention, it should have been much more definitely expressed. In the absence of unambiguous terms, the decision in the *Gordon Case* was inevitable, for the following reasons:—

Though, on another point, as before stated in Chap. VIII., the House of Lords, in the *Gordon Case*, ignored the rule of limiting statutory protection of bankers to risks imposed on them directly or indirectly by legislation, they recognise that the whole system of protection for bankers under the crossed cheques sections must be regarded as confined to the risks imposed upon them by the introduction of crossed cheques. A banker was definitely forbidden to pay crossed cheques contrary

to the crossing by the Crossed Cheques Acts of 1858 and 1876. This rendered the intervention of a banker imperatively necessary in the case of crossed cheques. Correlative protection was first accorded by the proviso to sect. 12 of the Act of 1876. The dropping of the direct prohibition in the Bills of Exchange Act, 1882 (see *post*, p. 256), might be put forward as having removed the absolute necessity of the intervention of the collecting banker; but, as there shown, reasons exist, directly derivable from the Act, which render it impossible for the holder of a crossed cheque to obtain payment except through a banker. The obligation of the banker to collect therefore remains, and justifies the correlative protection continued by sect. 82 of the Bills of Exchange Act, 1882. There is, theoretically, no such necessity in the case of an uncrossed cheque, and the banker's intervention for its collection is voluntary, for the convenience of the customer, stands exactly on the same footing as it did prior to any of the Crossed Cheques Acts, and is entirely outside the scope of either those enactments, or the crossed cheques sections of the Bills of Exchange Act. (See *per* Collins, M.R., in *Gordon v. London, City and Midland Bank*, [1902] 1 K. B., at p. 263; *per* Stirling, L.J., at p. 280; *per* Lord Macnaghten, [1903] A. C., at p. 246.)

This view is strengthened by the sub-section embracing not only uncrossed cheques but cheques crossed generally, as to which the banker can need no additional protection.

In the *Gordon Case*, [1902] 1 K. B., at p. 272, Collins, M.R., held there was no protection on the further ground that, by taking the cheques from a wrongful holder, the bank dealt with them in a manner amounting to conversion before crossing them, and could not purge their conversion by subsequently crossing them to themselves. This view is not consistent with that

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of the House of Lords in the same case, which recognised the obvious deduction that, where sect. 82 gives protection in respect of the receipt of the money, that protection necessarily covers all steps taken in the ordinary course of business for the purpose and in the process of obtaining that result. To give effect to this it is permissible, indeed necessary, to ignore the intervention of forged indorsement.

What is effect
of sect. 77,
sub-sect. 6?

Unless it was designed to enable the banker to protect himself, it is difficult to say what this sub-section really means or does. Sir Mackenzie Chalmers suggests (*Bills of Exchange*, 8th edit., p. 298), in a note to it: "This is new. It may protect the banker from possible frauds by his clerks." Collins, M.R., says, in *Gordon's Case*, [1902] 1 K. B., at p. 272: "This is a facility given for the purpose of affording additional protection during the process of collection after the crossing of the cheque." In the same case, Stirling, L.J., at p. 280, says: "Where a banker simply acts as agent for the collection of a cheque, he may protect himself from dishonesty by crossing the cheque specially to himself." In the same case, Lord Lindley says the sub-section might be useful if an indorsement were forged after a crossing ([1903] A. C., at p. 250).

Taking first the view suggested by Stirling, L.J., and Sir Mackenzie Chalmers, that the object of the crossing is to protect the banker himself against dishonesty, it is not very clear what the danger is or how it is in any way met by the crossing.

If the cheque itself were stolen by one of the banker's clerks, or by a stranger, the banker would presumably not be liable, unless it were stolen by the clerk, and the banker had previous reason to suspect him.

If the money were received in the ordinary course of business, and then embezzled by an *employé* of the banker, the banker would probably be liable (*Mackersy v.*

Ramsays, 9 Cl. & Fin., *per* Lord Cottenham, at p. 848); but this liability would attach just the same, or even more distinctly, if the cheque were paid in strict conformity with the crossing.

Next, in no event whatever could the crossing banker have any remedy against the paying banker for paying in contravention of the crossing. The crossing banker, as *ex hypothesi* only collecting the cheque, is in no sense the true owner, to whom alone the remedy is given by sect. 79.

Collins, M.R., does not in terms state that the supposed protection is for the banker himself. It is conceivable that he had in view protection of the true owner. Probably the true owner would have a remedy against the paying banker, if he paid in contravention of such crossing, for any loss thereby sustained.

It seems somewhat far-fetched that the banker should take the trouble thus to afford the true owner, even if he be his customer, a protection the true owner has not thought fit to take for himself. If the danger suggested by Stirling, L.J., and Sir Mackenzie Chalmers exists, it must emanate from the true owner, and it would be entirely optional with him which banker he went against. Combining the three views, the curious result accrues that the collecting banker gives the true owner an alternative remedy against the paying banker if he pay contrary to the crossing, but gets nothing at all himself by this operation, since, as shown above, he acquires no claim or remedy over against the paying banker. With respect to Lord Lindley's *dictum*, it is difficult to see what inducement there could be to anyone to forge a further indorsement on a cheque already in order for collection.

In *Sutters v. Briggs*, [1922] A. C. 1, Lord Birkenhead, L.C., delivering the judgment of himself and Lords Buckmaster and Carson, deals with the question as follows :

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“ The argument on this point (sect. 77 b and sect. 82) is that as the sub-section gives a banker power to cross a cheque sent to him for collection specially to himself, it necessarily follows that he would not have that power apart from the sub-section and is not a holder.

“ It is implicit in such an argument that although a banker who is acting as an agent for collection has the major right of crossing a cheque specially to himself, he does not possess the minor right of crossing it generally, or specially to another banker, or of making it not negotiable. Therefore a county banker to whom a cheque is sent for collection may not cross it specially to the bankers acting as his agents even for the purpose of safeguarding it in transit. A decision involving such a consequence would effect a revolution in banking practice. This sub-section, which was not in sect. 5 of the Bills of Exchange Act, 1876, was possibly inserted *ex abundanti cautela*, lest it might be argued that the practice was unlawful as constituting a breach of the relation of principal and agent, inasmuch as it recognised only payment made to the agent.” Nor does sect. 82 afford assistance to the appellant. [Quotes it.] “ I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent for collection is not a ‘ holder.’ On the contrary, the opposite inference is far more plausible, viz., that the protection becomes necessary because he is a holder and as such liable to an action for conversion.

“ The appellant’s attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange Act, C.C., 1906, confers the same protection on bankers who by their action have made themselves not merely ‘ holders ’ but holders in due course. (*Gordon Case*, and *Bowen, L.J., in National Bank v. Silke*, p. 429.) Moreover, if bankers are not holders of cheques for which they are agents for collection only, they derive

no benefit from sect. 27, sub-sect. 3, as the sub-section does not apply even when there is a lien to a person who is not a holder " (pp. 16-18).

When once the idea of the collecting banker getting by means of this sub-section any protection under sect. 82 is exploded, there can be no ground for suggesting any distinction between cheques " sent " or " brought " for collection ; and, by virtue of the sub-section or his right as holder, the banker must be entitled to cross them specially to himself, by whatever means they reach his hands.

It is the custom of bankers to stamp their names on the face of all cheques passing through their hands for collection, primarily for Clearing House and identification purposes. In some cases this cannot operate as a crossing, *e.g.* when the cheque is already crossed specially to that bank. In other cases, as previously stated, it is recognised as a crossing to that bank, as well as a means of identification.

Banker's
stamp.

CHAPTER XI

MARKING CHEQUES

Marking at
instance of
customer.

THE object and effect of a banker's marking cheques at the instance of the customer has been stated by the Privy Council to be to further the ready acceptance of the instrument by affording evidence on the face of it that it is drawn in good faith, and that there are funds sufficient and available to meet it, and as adding the credit of the drawee bank to that of the drawer. (*Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281 ; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.)

But it must be remembered that both of these cases were appeals from colonies, where the law as to marking or certification of cheques cannot be assumed to be the same as in this country. (See an article, "Certification of Cheques," in the *Journal of the Canadian Bankers' Association*, vol. ix. p. 323.)

It may be taken that the marking of a cheque at the instance of the customer does not, in this country, involve any direct or immediate liability on the part of the banker to the payee or any subsequent holder of the cheque. The marking does not possess the essential characteristics of an acceptance, required by the Bills of Exchange Act. In *Keane v. Beard*, 8 C. B. N. S. 372, it was suggested that there was nothing to prevent a banker accepting a cheque if so disposed, but it is never done ; and in any event marking is, neither in form nor effect, an acceptance of which the payee or a holder can avail himself.

Nor does such marking, at the instance of the cus-

tomer, render the bank liable to the payee or holder for money received to his use. CHAP. XI.

To constitute such liability several conditions must concur. First, the money sought to be recovered must have been actually received by the defendant, or something must have occurred which is equivalent to the receipt of money. (*Prince v. Oriental Bank Corporation*, 3 A. C., at p. 328.) In view of the fact that a cheque is not an assignment of any specific funds, and of the limited interpretation put upon the process of marking in the cases above quoted, it may be strongly doubted whether the request to mark, and the banker's compliance with that request, amount even to anything equivalent to the receipt of money for the specific purpose of meeting the cheque. But, assuming it does, the second condition must be fulfilled. There must be an acknowledgment to, if not a contract with, the specific person who is plaintiff in the action, that the money has been received for his use or is held at his disposal. "There are many cases which establish that no action for money had and received will lie against a banker or agent in respect of funds which his principal has ordered him to pay to any person, at the suit of the person in whose favour the order is made, where the banker or agent has not assented to the order and communicated his assent to the plaintiff." (*Per Tindal, C.J., in Warwick v. Rogers*, 5 M. & G. 340, at p. 374; see also *Malcolm v. Scott*, 5 Ex. 601.)

Question of liability to holder.

The intimation, if any, conveyed by the marking of a cheque is far too vague and indeterminate to operate as such admission.

In so far as any representation is involved in the matter, it might be a question whether it were not made by the customer in handing over the cheque rather than by the banker in marking it. It might fairly be argued that the banker only certifies, as between himself and

CHAP. XI.

his customer, to an existing fact bearing on the state of accounts between them, viz. that the cheque is drawn in good faith, on funds at the time sufficient to meet it; much in the same way as a customer might get his bank book made up to date in order to afford evidence of the balance at his disposal. Following this, it might be contended that the representation to the payee or subsequent holder lies in the use made by the customer of the intimation conveyed by the marking, when he issues the cheque; as if at the same time he showed his pass book as evidence of the balance to his credit.

The stronger argument, however, is that the admission or acknowledgment, if any, is not made to any definite ascertained person, so as to qualify him for plaintiff in the action. The cheque may be negotiated by the payee; even if, at the time of marking, it purported to be payable to him only, it would still be within the power of the drawer to remove this restriction before issue. The case falls, therefore, altogether outside the principles above laid down.

Besides all this, there is the weighty consideration that if such effect were accorded to the marking of a cheque, it would make it tantamount to an acceptance by the banker, a character from which, as above stated, it is debarred.

It is therefore conceived that the expression "adding the credit of the bank to that of the drawer," used by the Privy Council in the cases referred to, if applicable at all in English law, must not be understood to import any liability on the part of the banker to the holder of a marked cheque. There certainly appears to be no instance of a holder having recovered against a banker on a marked cheque in this country.

If the marked cheque were brought to the bank by the payee or a holder, and the bank were to undertake to pay the specific person who brought it, or admit that

they held the money for his use, such admission or promise would seem to be sufficient to bind the bank and obviate any difficulty arising from the want of appropriation of a definite sum to the cheque. (See *Prince v. Oriental Bank Corporation*, 3 A. C., at p. 331.)

Undoubtedly that is so, when the cheque is presented for payment, and, for some reason or other, marked by the bank instead of being paid. (*In re Beaumont*, [1902] 1 Ch., at p. 895.) So also, where cheques received from customers by London clearing banks too late for presentation through the Clearing House on day of receipt are sent, as often happens, to another clearing bank on which they are drawn, direct, with a request to mark the cheque, and this is done.

As between banker and banker, such marking has long been legally recognised as importing a promise or undertaking to pay, not analogous to acceptance, but based on custom. "Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another." (*Goodwin v. Roberts*, L. R. 10 Ex., at p. 351.)

Marking as
between
banker and
banker.

As early as 1810, in *Robson v. Bennett*, 2 Taunt. 388, the court held that one banker rendered himself liable to another by marking a cheque presented after 4 p.m. No doubt that case proceeded partly on the basis of such marking being equivalent to acceptance, the rules as to which were then far laxer, admitting of even oral acceptance. But the custom has progressively grown and been recognised since then, and if now adopted for purposes other than clearing the most reasonable effect to be attributed to it is that it binds the drawee banker to any other banker into whose hands the cheque may come. He could hardly refuse payment of a cheque he had marked, if it was presented by or through another banker, who might have altered his position in reliance

CHAP. XI. on the promise or undertaking implied from the marking.

Stopping
marked
cheques.

This raises the question of the customer's right to countermand payment of a cheque which the banker has marked at his request. The view among bankers is that the customer has no such power, and this is probably correct. True, the Bills of Exchange Act does not recognise, in sect. 75, any exception to the rule there laid down that the authority of a banker to pay a cheque is determined by countermand of payment; and it might happen that between the date of the marking of the cheque and the countermand, and before presentation, the customer became aware of some fraud or other circumstance which, but for the marking, would fully justify him in stopping the cheque. It is also true that an order to a banker to pay money is executory and revocable until something definite has been done by the banker binding him to the person to be benefited, as by crediting him or admitting that he holds the money to his use. (*Gibson v. Minet*, 2 Bing. 7.) But, as against this, it may be said that, though the banker has incurred no direct legal liability to the payee or holder, he has, at the request and for the benefit of the customer, undertaken a moral and professional obligation, founded on recognised custom, towards any other banker who may present the cheque for payment. If so, the banker is in the position of an agent whose agency is coupled with an interest, or at least in as strong a position as the betting agent in *Read v. Anderson*, 13 Q. B. D. 779. (Cf. *Robson v. Bennett*, 2 Taunt. 388.)

Either of these positions is sufficient to preclude the customer from withdrawing the authority and stopping payment of the cheque to the detriment of the banker.

The customer could not be heard to say he did not know of the object of the marking, inasmuch as he got the cheque marked in order to obtain the benefit of

the banker's support. Nor would it make any difference that the cheque was an open one and might never pass into another banker's hands ; because, if refused payment when presented by the payee or holder, it would be open to him to present again through a banker. The case for the banker would naturally be even stronger if the cheque were a crossed one when marked.

One reason assigned by bankers why a cheque marked by a banker at the request of a customer cannot be stopped is that, having been so marked and debited to the customer, it has technically been paid.

This is not so. Where, as in the cases above referred to, the cheque is presented for payment and marked instead of paid, the transaction may be treated in the light of constructive payment ; where the cheque is marked at the instance of the customer, before issue, and to further the negotiation of the instrument, this has no analogy to payment, actual or constructive.

It would seem that in England the practice, common in America, of the payee or holder bringing a cheque to the drawee bank and getting it marked, is practically unknown. If in any case it were adopted, the results would seem to be as follows : it would not amount to an acceptance ; so the banker could not be sued on the cheque. There has been no payment in by the customer to meet the particular cheque nor any appropriation by him. Possibly the marking might be held a representation by the banker that monies had been lodged to meet the cheque. There is no distinct admission or appropriation by the banker to any specific person, the whole object being further negotiation of the cheque. But seeing that the action is the banker's own, without any intervention of the customer, it might well be that a court would interpret the transaction somewhat strongly against the banker, and would hold that there was in effect a sufficient representation and admission to the holder to entitle

Cheque
marked at
instance of
holder.

CHAP. XI.

him to sue the banker for money received to his use. With regard to another banker presenting the cheque the marking banker would presumably be bound by the implied undertaking or promise to pay. The banker into whose hands it came could have no means of telling at whose instance it was marked, nor indeed does the question concern him in any way; all he looks to is the fact that it is marked by a banker.

But, unlike the case where the cheque is marked at the instance of the customer, it would seem that the customer could prior to presentation for payment effectually countermand payment of the cheque and refuse to be debited with it if paid contrary to his orders. He has done nothing to curtail his right to countermand payment under sect. 75, and there is no appropriation or constructive payment sufficient to counteract such a right. The theory that payment of another man's debt without his authority gives a right against him, apparently countenanced in *Reid v. Rigby*, [1894] 2 Q. B., at pp. 43, 44, even if sound, could hardly cover a case where the payment was directly contrary to orders, though the holder might have sued the drawer.

The customer might even contend with considerable show of plausibility that his liability on the cheque to the holder was discharged by the latter's having accepted the liability of the banker in lieu thereof by way of novation, a view which has obtained a large measure of support in America.

American decisions on the point would, however, have little or no weight in an English case, owing to the laxer rules as to acceptance obtaining in that country and the consequently greater importance and efficacy attaching there to the certification of a cheque.

The cases, referred to above, where, before countermand, the cheque is presented for payment by or on behalf of a specific holder and, as in the case of cheques

between two London clearing bankers received too late for the day's clearing, marked for payment next day, is different. There is here a complete appropriation to a definite individual; the proceeding is in the ordinary course of business, which the drawer must be taken to have contemplated; or it may be regarded as a constructive payment sufficient to determine the customer's right of revocation, as being tantamount to payment before countermand. (*Gibson v. Minet*, 2 Bing. 7; *In re Beaumont*, [1902] 1 Ch., at p. 895.) Again, the customer bargains not to leave the banker liable for anything done in the ordinary course of his business, which would be the case here if he could revoke. (Cf. *Read v. Anderson*, 13 Q. B. D., at p. 783.)

Where a cheque is marked at the request of the drawer, the banker is justified in retaining funds to meet it, and, if necessary, in dishonouring cheques which would reduce the credit balances below the amount. For how long he should continue this course does not appear to have been settled. In Scotland a week is regarded as a reasonable period. A cheque, even when marked, is intended for speedy presentation, not as a continuing security.

CHAPTER XII

THE PAYING BANKER.

THE expression "the paying banker" is a convenient one to denote the banker in his relation to cheques drawn on him by the customer; more especially when it is desired to consider his position as compared with that of the "collecting banker," hereinafter dealt with.

The expression is also applicable to the banker with regard to bills domiciled with him by the customer for payment, usually by their being accepted payable at the bank.

Paying
cheques.

With regard to cheques, the paying banker's main obligation is that he is bound to pay cheques drawn on him by a customer in legal form, provided he has in his hands at the time funds of the customer sufficient and available for the purpose.

Such funds are in reality only represented by the unincumbered debt from the banker to the customer, otherwise the ascertainable credit balance on current account; but it would be hypercritical to vary the accepted formula for the sake of such technical accuracy.

The obligation to pay cheques is usually spoken of as an obligation superadded in the case of a banker to the relation of debtor and creditor. (*Foley v. Hill*, 2 H. of L. Ca. 28.)

"The relation between banker and customer is that of debtor and creditor with a superadded obligation on the part of the banker to honour the customer's cheques when the account is in credit" (Lord Finlay, L.C., in *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A. C. 777.) Or the obligation may be

regarded as a leading constituent of the implied contract between banker and customer. (See *per* Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.)

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One preliminary question arises as to the banker's liability in paying cheques. Before the Bills of Exchange Act, it was laid down that a banker, in paying cheques, must not be negligent and could not charge his customer with money lost through his negligence. (*Bellamy v. Marjoribanks*, 7 Ex. 389; *Carlton v. Ireland*, 5 E. and B. 765.)

Question of
banker's
negligence.

Of course the banker must not be negligent; it is as much part of his contract to take care as it is of the customer's, and it is true that as a general rule he has himself to bear loss accruing from his negligence. But in the very connection in which the question might most possibly arise, namely, the payment of a cheque with forged indorsement, the wording of sect. 60 would seem to introduce an exception or saving in favour of the banker and hold him immune if he has paid in good faith, albeit negligently. Sect. 60 protects the banker in such case if he pays the cheque "in good faith and in the ordinary course of business"; sect. 90 says, "A thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not." It is to be noticed that in sect. 79 and sect. 80, payment by the banker to be protected must be "in good faith and without negligence," and this difference, together with the interpretation of good faith in sect. 90, seems to imply that "ordinary course of business" is not, in this particular instance, incompatible with negligence." Ordinary course of business" is a somewhat vague expression; there can be no ordinary course of business in extraordinary circumstances. As Lord Halsbury said in *Vagliano's Case*, [1891] A. C., at p. 117: "I do not know what is the

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usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion."

In 1904, in *Brighton Empire and Eden Syndicate v. London and County Bank*, the bank had cashed an order cheque drawn by the plaintiffs on which the indorsement had been forged by a servant of the plaintiffs, whose handwriting was alleged to be well known to the bank and which it was said it was negligence in the bank not to recognise. The Lord Chief Justice, Lord Alverstone, held there was no case with regard to this cheque, as no want of *bona fides* was proved against the bank, who were therefore protected by sect. 60. The case appears only to be reported in the Times newspaper, March 24, 1904, at p. 13.

It would therefore seem that negligence does not preclude the protection of that section.

In the same case, however, the bank were held liable for negligence in allowing the same servant to make entries of sums and dates in the plaintiffs' pass-book and having neglected to check the entries so made, whereby he deceived the plaintiffs and their accountants. This point the Lord Chief Justice left to the jury on the question of negligence, and they found for the plaintiffs with £482 10s. 1d. damages. This supports the general principle that bankers are liable for negligence.

There are intimations in some of the older cases that the reason why a banker cannot charge his customer with a cheque to which that customer's signature has been forged is that a banker is bound to know his customer's signature and that it is his negligence in not detecting the imitation which disentitles him to debit the customer. The fallacy of this view was exposed by Mathew, J., in *River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7.

The true reason, of course, is that the banker cannot charge the customer with monies paid away without his mandate or authority.

Present state of the law

In previous editions of this book it was only possible to deal with the respective rights and liabilities of banker and customer with regard to the drawing and payment of cheques as matter of argument and opinion. That was due to the chaotic state of the law, mainly attributable to the decision of the Privy Council in *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559. That decision professes to be based almost entirely on the previous judgment of the House of Lords in *Scholfield v. Londesborough*, [1896] A. C. 514. Especially as Lords Halsbury and Macnaghten were members of the Court on both occasions, one would have expected to find that the latter case really did afford a *ratio decidendi* for the former.

As now conclusively shown by the judgment of the House of Lords in *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A. C. 777, that is not so.

Scholfield v. Londesborough had no bearing or application whatever on or in *Colonial Bank of Australasia v. Marshall*.

Scholfield v. Londesborough was the case of holder suing acceptor for the face value of a bill which had been raised by forgery after acceptance. *Colonial Bank of Australasia v. Marshall* was the case of a customer refusing to be debited by the bank with the increased amount of cheques, the forgery having been facilitated by the customer's negligently signing the cheques when they showed blank spaces available for the insertion or alteration of the amount payable.

Of course in both of these cases the familiar *Young v. Grote* and "the modified doctrine of Pothier" figured largely.

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*Scholfield v.
Londes-
borough.*

In *Scholfield's Case* they were inapplicable since they turn on the question of mandant and mandatory, principal and agent, a relation they recognise as obtaining between customer and banker, but which there is no ground for asserting as between acceptor and the indeterminate future holder of a bill. The House of Lords in *Scholfield v. Londesborough* most clearly and carefully pointed this out, and, save for some criticisms by Lord Halsbury as to the reasons of the decision in *Young v. Grote*, which have always been matter of discussion, and a curious mistranslation of Pothier's French, altering the whole sense, at the critical point of a long quotation, by the same learned Lord, the judgments are an indirect confirmation of the principle laid down by the earlier authorities, that the customer is the mandant or principal, the banker the mandatory or agent, in the matter of drawing and paying cheques; that consequently the banker is entitled to the full protection of one who has to obey the orders of another, with the natural corollary that if, by the negligence of the customer in drawing or issuing his cheques, the banker is misled and loss ensues, that loss is to be borne by the customer and not the banker.

*Colonial Bank
of Australasia
v. Marshall.*

In *Colonial Bank of Australasia v. Marshall*, this case is vouched as authority for the very positions it was careful to differentiate. The Board ignored the fundamental distinction between the cases, despite the signposts set up in *Scholfield's Case*. The main ground of the decision, however, was that the House of Lords in *Scholfield's Case* had two questions before them: (1) was there a duty? (2) if so, was there a breach of that duty, in other words, negligence?; and that as the House of Lords decided in favour of the acceptor, they must be taken to have held that, assuming the duty, the negligent signing was not a breach of that duty, and not negligence; that the duty set up in either case was the same, and the breach of it the same, therefore the one case was on all fours with

the other. Not very conclusive argument. The House of Lords having found there was no duty, there was no particular reason why they should proceed to consider whether, if there had been a duty, there would have been a breach of it. Incidentally, the Judicial Committee cast aspersions on *Young v. Grote* and uttered the usual sophisms as to its not being anybody's duty to anticipate forgery. The concluding portion of the judgment is as follows: "The principles there [*Scholfield v. Londesborough*] laid down appear to their Lordships to warrant the proposition that whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purpose of forgery is not by itself any violation of that obligation." And so they decided against the bank, and the decision carried greater weight and authority by reason of the participation therein of Lords Halsbury and Macnaghten, two of the four members who composed the Court. On the law as then laid down, the banker was for twelve years left in a dangerous and helpless condition. His position as a mandatory or agent, the existence of any duty towards him on the part of the customer, was either denied or made so nebulous that nothing could be predicated of it and no reliance placed on it. One thing only was clear: that the customer could draw cheques with any amount of blanks facilitating forgery, and if the opportunity was taken advantage of to increase the amount and the banker paid it in good faith and without negligence, it was he and not the customer who had to bear the loss, so long as the customer was not acting fraudulently.

It is proposed to return to this question hereafter in direct connection with forgeries; it is partially dealt with here because, so long as the *Colonial Bank of Australasia Case* remained unchallenged, it was impossible

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to formulate any duty owing by the customer to his banker, and because a review of the previous situation seems desirable for the understanding and appreciation of the rational position now occupied by the banker under the judgments now to be noticed.

*London Joint
Stock Bank
v. Macmillan.*

In *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A. C. 777, Macmillan and Arthur had a clerk who was in the habit of preparing and presenting for signature to one of the partners cheques for petty cash of small amount. On the occasion in question, this clerk, with a view to fraud, prepared a cheque, inserting a 2 in the space for figures, with available blanks before and after the numeral, and putting absolutely nothing where the sum in writing should appear. The cheque was to bearer and uncrossed. This inchoate instrument he tendered to one of the partners who was just leaving the office, who, being in a hurry, failed to notice anything unusual, and being told it was for petty cash and that two pounds would be sufficient, forthwith signed it. The clerk filled in "One hundred and twenty pounds" in writing, inserted a 1 before the 2 and a 0 after it, presented it to the bank, received the £120, and absconded. The judge at the trial and the Court of Appeal decided against the bank; the House of Lords reversed this decision and gave judgment for the bank.

They rehabilitated *Young v. Grote* and "the modified doctrine of Pothier," they swept away *Colonial Bank of Australasia v. Marshall* as a miscarriage of justice, and put the paying banker into a sound and rational position on much the same lines as those later described and defined by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.

Lord Finlay, L.C., said, "The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in

credit. A cheque drawn by the customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care to prevent the banker being misled. If he draws a cheque in manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty."

To the argument that loss by forgery is not a natural or direct consequence of such negligence or breach of duty, and that either as breaking the connection between the breach and the consequence or as negating negligence, crime was a remote contingency which no one was bound to anticipate, he replies as follows:—

"As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote, but a very natural consequence of neglect of this description.

Of *Young v. Grote* he says: "*Young v. Grote* was decided nearly a hundred years ago. It has been often approved by many of our greatest judges, and with the exception of a recent case in the Privy Council, with which I shall deal later on, there has never been a decision inconsistent with it but for that now under appeal."

The case in the Privy Council referred to was, of course, *Colonial Bank of Australasia v. Marshall*. The subsequent dealing with it was to declare it an erroneous decision. And Lord Finlay continues, "In my opinion

CHAP. XII. the decision in *Young v. Grote* is sound in principle and supported by a great preponderance of authority and must be treated as good law."

The judgments in the *Macmillan Case* are naturally confined in terms to the drawing of cheques. But with regard to bills, accepted by a customer payable at his banker's, the relation of mandant and mandatory, of principal and agent, obtains at least as much as in the case of cheques. There is a contractual relation or implied contract binding the banker to pay such bills on behalf of the customer. (See *Vagliano's Case*, [1891] A. C. 107.) Moreover, the banker is denuded of any statutory protection in paying such bills, unless payable to bearer, which they never are. There is, therefore, all the more ground and reason for holding him entitled to full consideration and, if necessary, indemnity from the customer. *Mutatis mutandis*, it may therefore be taken that the principles of the *Macmillan Case* apply equally to domiciled bills.

One of the differences to be borne in mind is that the drawer, not the acceptor, is master of the form of the bill.

In this connection, the opinions of Lord Esher and Rigby, L.J., in the Court of Appeal in *Scholfield v. Londesborough*, that, admitting the acceptor's duty to take care, his omission to detect or notice available blanks in the bill tendered to him for acceptance was not negligence, must be taken into account.

The exposure in the *Macmillan Case* of the misapplication of this opinion and the subsequent judgment of the House of Lords, exemplified in *Colonial Bank of Australasia v. Marshall*, does not necessarily impugn its essential soundness. The duty to take care in accepting, non-existent towards the indeterminate holder, doubtless does exist towards the banker at whose bank the bill is, by agreement, accepted payable; whether the non-detection of opportunities for fraud is a breach of

such duty would be a question for a jury dependent on the obviousness and flagrancy of such opportunities, as compared with the state of affairs in *Scholfield v. Londesborough*, while the recognition in *Macmillan's Case* of the duty to anticipate and obviate forgery tends to minimise the weight of the *dicta* in *Scholfield v. Londesborough*, which rule it out as entering into the question of negligence.

In *Vagliano's Case*, [1891] A. C. 107, Lord Selborne says, at p. 124: "It is not disputed that there might, as between customer and banker, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances." Inasmuch as Lord Selborne enumerates other circumstances, no real payee, representation made by customer to banker, and so forth, it is not unreasonable to suppose that the negligence to which he alludes is in reference to the form of the bill when accepted.

The Duty to pay Cheques

Every authority from *Foley v. Hill to Joachimson v. Swiss Bank Corporation* and the Bills of Exchange Act alike recognise that the banker's primary function and duty is to honour his customer's cheques, provided the state of the account warrants his doing so, and there is no legal reason or excuse to the contrary.

Apart from this contractual obligation, or as a consequence thereof, the paying banker must remember that his customer's credit is or may be seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque, the greater the possible damage to credit. (*Marzetti v. Williams*, 1 B. & Ad. 415.)

Theoretically, substantial damages may be given

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against the bank without proof of actual loss to the customer (*Rolin v. Steward*, 23 L. J. C. P. 148), and in many cases large sums have been awarded.

But a more reasonable view appears to be now gaining ground. It is contended that the presumption of necessary serious injury only applies where the customer is a business man, and that, at least in other cases, actual damage must be proved. (Cf. *Wilson v. United Counties Bank* [1920] A. C. 112, 132.) In a case of this sort, *Evans v. London and Provincial Bank*, before Lord Reading, L.C.J., reported in the Times newspaper, March 1, 1917, the wife of a naval officer sued for the dishonour of a cheque. The Lord Chief Justice directed the jury that the only question was what amount of damages were due to the lady for the mistake the bank had undoubtedly made, though she had not suffered any special damage. If necessary, he said, the question of law which might arise could be discussed thereafter.

The jury returned a verdict for one shilling damages, the foreman saying they did not consider that Mrs. Evans had suffered anything more than annoyance.

Again, in *Cox v. Cox & Co.*, reported in the Times, March 18, 1921, where a cheque had been returned marked, "N.S. Present again in a few days," the plaintiff sued for dishonour of the cheque and for libel. The bank paid £50 into court in respect of the breach of contract in dishonouring the cheque, which plaintiff accepted and continued the action for the alleged libel. The jury found for the defendants, and Darling, J., intimated that he did not think the £50 would have been recoverable, if not paid in.

As to answers on cheques, see *post*, under that heading.

Conditions under which the Banker is bound to pay

As specified or implied in all the statements of a banker's obligation to honour his customer's cheques,

that obligation is circumscribed by certain necessary conditions. CHAP. XII.

First, as to the character of the cheque.

It must be a legal one. (*Emmanuel v. Roberts*, 9 B. & S. 121.) Cheque must be legal.

It might be argued that an unstamped cheque came within the definition of an illegal one, or that anyway the banker was bound or entitled to refuse payment on the ground that if he paid, he would incur a £10 penalty under sect. 38 of the Stamp Act, 1891. Possibly he would be technically justified in so doing, but in view of the proviso (2) to that section, which entitles him to affix the necessary adhesive stamp, pay the cheque, and charge the stamp in account with the drawer, or deduct it from the amount paid, it would be exceedingly arbitrary and unwise for a banker to adopt so extreme a course.

Next, the cheque must be regular and unambiguous in form. Regular in form.

Prior to the *Macmillan Case*, the only direct authority on this point was a *dictum* of Lord Blackburn's in 8 A. C. at p. 864, to the effect that the banker was only bound to pay "cheques properly drawn."

Bankers had long protested against the aberrations of business firms who issued what came to be known as "freak cheques," combining advertisement with the ordinary features of a cheque, importing unusual terms as to receipt or presentation, which left the banker in doubt whether it was a cheque or not, and so forth.

In previous editions of this book the view has been expressed that bankers would be justified in refusing to pay in extreme cases of this sort, moulding the reply in terms calculated to safeguard the customer's credit; but in the absence of definite legal sanction for such a course the position was a difficult one.

But now judgments both in the *Macmillan* and the

CHAP. XII. *Joachimson Cases* explicitly declare that it is part of the contractual relation that the customer shall issue and the banker receive his mandate, embodied in the cheque, in plain, unmistakable terms.

In the *Macmillan Case*, Lord Haldane said, "The customer contracts reciprocally that in drawing his cheques he will draw them in such a form as will enable the banker to fulfil his obligations, and therefore in a form which is clear and free from ambiguity."

The banker's position under the pact he defines as follows: "The banker, as a mandatory, has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called upon to do."

And Lord Shaw enunciates much the same rule with regard to a cheque which suggests having been tampered with.

The summary in the *Joachimson Case* by Atkin, L.J., of the mutual rights and responsibilities of the parties, hereinbefore set out, includes a statement to the like effect.

It was recognised in the *Macmillan Case* that failure on the customer's part to comply with his obligation in this respect absolved the banker from his to pay the cheque. The duties being correlative, the banker's does not arise until and unless the customer fulfils his, he, as mandant or principal, being the party with whom inception rests. Another principle, recognised in the *Macmillan Case*, which would justify the banker in his refusal, is that the customer has no right to put upon the banker and the banker is not bound to undertake any risk or liability not contemplated in or essentially arising out of the ordinary routine of business.

It may be noted that in *Macmillan's Case*, two of the Law Lords assumed or suggested that the banker's answer on a cheque refused payment on the ground

of irregularity would or should be "Refer to drawer." CHAP. XII.
 This is not quite consonant with banking practice or feeling. "Refer to drawer" is a far milder form of refusal than N/A or N/S, and does not necessarily reflect on the drawer's financial position. (See *Flach v. London and South-Western Bank*, 31 Times L. R. 334.) But the usual answer of the banker in such cases would be "cheque irregular, requires confirmation," which is quite innocuous and fully answers the purpose.

If the banker elects to pay on an ambiguous mandate and does so on a reasonable misinterpretation of its meaning, he may set up that the misleading him by the customer disentitled the customer to complain, being a breach of the customer's contractual duty, or rely on the recognised rule that an agent cannot be made liable who has adopted a reasonable course in face of ambiguity in the principal's instructions, whether such ambiguity arise from the method of expression or the medium of communication. (*Ireland v. Livingston*, L. R. 5 H. of L. 395; *Curtice v. London, City and Midland Bank*, [1908] 1 K. B. 293.)

Where any particular form of irregular cheque has been paid without objection for an appreciable period, it would not be open to the banker to return any such without previous warning to the customer. A course of business has arisen which the customer is entitled to assume will continue until he receives due notice of termination.

It may be confidently asserted that the right of the banker to decline unusual risks, now clearly recognised, is not confined to those arising directly from ambiguity of the mandate due to the customer, whether in his framing or transmitting it. It is a fair reading of the contractual obligation that not only shall the customer not impose, but the banker shall or need not undertake exceptional risks. There are contingencies arising in

CHAP. XII. banking practice, say with regard to indorsements, where, in the interests of banker and customer alike, the only reasonable course is that usually adopted, namely, to postpone payment pending enquiries or pending confirmation, stating the reason for refusing payment in appropriate and innocuous terms. Take the case of a cheque or draft negotiated abroad, on which appears a special indorsement in Arabic or other Oriental characters, conveying absolutely nothing to the ordinary Englishman. In the *Carlisle and Cumberland Bank Case*, [1911] 1 K. B. 489, Buckley, L.J., referring to a document in Oriental characters, said that with regard to it he was in the position of a blind man. Is the banker to pay it without enquiry or verification, relying on the protection of sect. 60, when "good faith" has no intelligent basis, the characters hardly "purport" anything to one to whom they convey no meaning, and the "ordinary course of business" would surely suggest verification?

By issuing such cheque, or in fact any cheque, the customer must surely be taken to empower the banker to act reasonably for his own protection in any contingency which may arise in connection with the cheque which he issues as his mandate.

It is true that the *dictum* of Maule, J., in *Robarts v. Tucker*, 16 Q. B. 560, that a banker might defer payment of a bill until he had satisfied himself that the indorsements on a bill were genuine, was expressly disapproved by the House of Lords in *Vagliano's Case*, Lord Macnaghten laying down that a banker must pay off-hand, and as a matter of course, bills presented for payment, duly accepted and regular and complete on the face of them; and as a general rule this doctrine would appear to apply with equal force to cheques presented for payment.

But it should be noted that the House of Lords' ruling only applies to bills regular and complete on the

face of them. This must be taken to include indorsements. So long as the indorsements are apparently in order, and regular in form, it may well be that, whether it be bill or cheque, the banker is not entitled to time to investigate their genuineness. In the case of cheques he does not need it, being protected by sect. 60. But when there is an abnormal feature, an inconsistency, an apparent irregularity, whether on the face of the cheque or bill or in the evidences of its negotiation, the banker is confronted with a difficult situation into which he has been drawn by the customer, who, in issuing the cheque or accepting the bill payable at his bankers, must be taken to have contemplated the vicissitudes and possibilities of negotiation, and the banker is entitled to take a reasonable course for his own protection. Such precaution would generally be in the customer's interest as well, but the banker might not be in a position to set this up in his own justification.

Of course, on whatever ground a cheque is refused payment, the banker is only responsible to his customer, unless he has marked the cheque or given some equivalent personal undertaking to the holder. A cheque is not, in England, an assignment of funds, and the holder has no claim of any sort on it against the banker on whom it is drawn.

Only responsible to customer.

It is to this principle of a cheque not being an assignment of funds that is generally attributed the undoubted fact that in England a banker is not bound to pay part of a cheque when he has in hand funds, but not sufficient to pay the whole amount.

No payment of part.

It is somewhat difficult to see how, in any event, the assignment of one specific sum or debt could operate as an assignment of any lesser sum or debt which happens to be due. It is probably more correct to base the banker's right to altogether refuse payment on the fact that his only contract with, or duty to, the customer is to pay a

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cheque when he has the equivalent or a larger sum in hand, as laid down by Atkin, L.J., in the *Joachimson Case*, and that part payment is not included in or contemplated by such contract or duty. Part of the amount of a cheque is obviously not "sufficient funds to meet it." (*Carew v. Duckworth*, L. R. 4 Ex. 313.)

It has been asked whether the holder of a cheque larger in amount than the available funds is entitled to pay in the difference to the customer's account and then withdraw the whole on the cheque. It is clear that the banker must not facilitate the operation by informing the holder how much the account is short of the amount of the cheque. That would be unjustifiable disclosure of the customer's affairs, and, if followed by receipt of the difference and payment of the cheque, would constitute a fraud on other creditors of the customer. (*Foster v. Bank of London*, 3 F. and F. 214; *Hardy v. Veasey*, L. R. 3 Ex. 107.)

The Institute of Bankers have expressed the opinion that where there is no disclosure, the balance should be received and the cheque paid. (Questions on Banking Practice, 7th edit., Question 490.)

The only criticism on this seems to be that if the customer subsequently became bankrupt, the trustee might want to know why the banker had abrogated in the holder's favour the usual rule by which monies paid in, even in notes or gold, are not available for drawing against, until such period has elapsed as is necessary to enable the bank to carry out the requisite book-keeping operations. (See *Marzetti v. Williams*, 1 B. and Ad. 415.) And, no doubt, it would be open to the banker to decline to pay the cheque on this ground, if he wished not to pay it. And such refusal would not interfere with his crediting his customer with the amount paid in. Where a cheque is refused payment with a request to present again, it lies entirely with the holder whether he will do

so or at once treat the cheque as dishonoured. (Cf. *Sednaoui v. The Anglo-Austrian Bank*, Journal of the Institute of Bankers, vol. xxx., 413 ; Times newspaper, April 26, 1909.)

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A banker cannot discharge his obligations to the customer by referring outstanding cheques to another bank, except by arrangement with the customer. A holder can treat a cheque as dishonoured if not paid on presentation at the bank on which it is drawn, and is not bound to go elsewhere for the money.

The rules of the Clearing House require that a country bank dishonouring a cheque presented through it shall return the cheque by first post to the bank into which it was paid. It must be returned direct, not through the London office. Where these rules apply, a bank neglecting to adopt this course will be held to have undertaken to pay the cheque. (*Parr's Bank v. Ashby*, 14 T. L. R. 563.)

Cheques should as far as possible be paid in the order in which they are presented, if there be any question as to the sufficiency of the balance to cover them all. (See *Sednaoui v. Anglo-Austrian Bank*, *ubi sup.*)

The fact that one cheque has been refused on the ground that it overtops the available balance would not justify the banker in refusing payment of a cheque subsequently presented for an amount within the balance.

The question has arisen as to what should be done when two or more cheques are presented simultaneously by the same post or through the Clearing and the balance is sufficient to satisfy one or some but not all.

Cheques simultaneously presented.

Where there is only one of the lot within the limit clearly that one should be paid. But if there are two each within the limit, but not enough money to pay both, or if there is enough money to pay two small ones but not one large one, if the small ones are paid, the banker's position is more difficult. On the one hand it is contended

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that if the banker pays any but not all, he is unduly favouring some of the customer's creditors ; on the other hand it is said that he is bound to protect his customer's credit as far as possible, and that he is not doing so if he refuses to pay such of the cheques as the account will stand. In one instance, referred to in the Journal of the Institute of Bankers for April 1914, a bank adopted the former course and dishonoured all the cheques, and apparently no legal proceedings followed. The better opinion seems to be, however, that the banker should pay as far as possible ; the proposition put to the Council was of a customer with a credit balance of £10 on his current account. Two cheques are presented the same day in the Country Clearing, each for £7. The question was asked should the banker return both cheques or only one ; if he is bound to pay one cheque, how is the selection to be made ? And the answer was " One cheque should be paid, but no ruling can be given where the amounts are equal. When the amounts are not equal, it is customary to pay the larger cheque if there are sufficient funds." In similar circumstances the preference of the larger cheque is probably justified by the fact that if the smaller were paid, there would still be a balance left.

But the banker is clearly not entitled to dishonour cheques presented because he knows of others to be presented shortly, unless he has special instructions from the customer to do so. (*Sednaoui v. Anglo-Austrian Bank, ubi sup.*)

Cheques out
of date.

It is the custom of bankers not to pay cheques which are presented after a certain period has elapsed since their ostensible dates of issue. The period varies ; with some banks it is six months, with others twelve.

The justification for this course is not very obvious. The difference, above alluded to, between the practice of various banks makes it difficult to set up a custom of bankers. Such a custom must be universal and uniform

among, at least, the bankers of a particular locality ; CHAP. XII.
there cannot, for instance, be one custom of bankers in the City and another in the West End. (Cf. *Rickford v. Ridge*, 2 Camp. 527, and *Lloyds Bank v. Swiss Bankverein*, 29 Times L. R. 219.) “It was either a custom of the trade or nothing” (Farwell, L.J., at p. 222). Nor does the custom of a particular bank bind even a customer until it develops into a course of business. Such custom is referred to in a note to *Serle v. Norton*, 2 Moo. and R., at p. 404 ; but the note is, of course, of no authority and the case itself affords none, especially in the altered conditions of the Bills of Exchange Act. The practice may owe its origin to the erroneous impression that the drawer of a cheque is discharged from liability if it is not presented within a reasonable time after issue. The Bills of Exchange Act is certainly not explicit on the point ; but, as hereinbefore explained (p. 123), the drawer’s liability holds good for six years, save in one contingency, that of the cheque not having been presented within reasonable time, the bank having failed within such reasonable time, and the drawer having lost money by reason of such failure and non-presentation, in which case he is discharged to the extent of his loss and no further. The banker naturally knows he has not failed in the interval between the date of the cheque and its presentment for payment, and would presumably be justified in paying it at any time within six years. No doubt cheques are intended for speedy presentation, not prolonged negotiation or as continuing security ; but that has no legitimate application beyond that of limiting the period a cheque may be held over to charge parties other than the drawer, the cheque differing herein from the ordinary bill on demand. A man who takes a cheque either direct from the drawer or by subsequent negotiation is perfectly entitled to hold it for any time short of six years from issue, and then present it, and, if not paid, sue the drawer unless the bank has failed meantime ; his only loss of remedy is

CHAP. XII. that against indorsees if he has not presented within reasonable time of such indorsement.

In case of order cheques, the banker might possibly justify refusal on the ground that the practice has become so general that payment after the allotted period would not be in the ordinary course of business, but here again the varying length of that period offers difficulties.

The answer given on such cheques, such as "Out of date," is, however, in no wise calculated to damage the customer's credit, and the question of the validity of the practice is, therefore, never likely to be raised.

Bankers generally call such cheques "stale," a term more properly applied to a cheque which is negotiated after being, on the face of it, an unreasonable time in circulation and so is assimilated to an overdue bill by sect. 36 (3). As to when a cheque so becomes stale or overdue, see *London and County Bank v. Groome*, 8 Q. B. D. 288. In the absence of special circumstances ten days or so would probably be held the limit.

The disputed question of the payment of cheques to a man known to be an undischarged bankrupt has already been dealt with.

The bearing of the Bankruptcy Act, 1914, on the right of the banker to pay cheques under various conditions affecting the customer is treated under the heading of "The Current Account."

Funds must be sufficient and available

The obligation of the banker to pay cheques drawn on him by his customer is subject to the condition that there are in his hands funds of that customer sufficient and available for the purpose. (See *per Parke, J.*, in *Whitaker v. Bank of England*, 1 C. M. and R., at pp. 749, 750; *Marzetti v. Williams*, 1 B. and Ad. 415, and the summary by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110.)

The Funds must be sufficient

As before stated, there is in England no obligation to pay part of a cheque, and such a proceeding would be unwise. The question of cheques simultaneously presented when there is enough money to pay some but not all has already been dealt with (*ante*, p. 215).

The right of a bank to combine separate accounts, whether at the same or different branches, involves the result that the sufficient funds to meet cheques must be calculated by deducting debit balances from credit balances all round, unless, by agreement or course of business, such accounts have to be kept separate, or they are kept in different rights or characters. (*Garnett v. M'Kewan*, L. R. 8 Ex. 10; *Buckingham v. London and Midland Bank*, 12 Times L. R. 70.) The customer has no corresponding right to combine, and can only draw on the branch at which he has a sufficient credit balance irrespective of any credit balance he may have elsewhere. (*Woodland v. Fear*, 26 L. J. Q. B. 202; *Garnett v. M'Kewan*, L. R. 8 Ex. 10, and the summary by Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110; *McNaghten v. Cox & Co.*, The Times newspaper, May 11, 1921.)

The Funds must be available for the purpose

As shown hereinbefore under the heading of "Current Account," the old theory that money cannot be followed into the banker's hands, that once it has assumed the form of a debt from the banker to the customer it becomes for all and every purpose a debt and nothing more, and that the banker is estopped from disputing the right of his customer to draw upon it, has undergone considerable modification by recent decisions. But it remains true that the banker cannot, of his own motion, set up the claims of third parties or dispute his customer's title to

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money he has received from him or for his account. Unless and until restrained by legal process, the banker must recognise the person from or for whom he received the money as the proper person to draw on it, and the money as available for that purpose. (*Calland v. Loyd*, 6 M. & W. 26; *Tassell v. Cooper*, 9 C. B. 509; *Szek v. Lloyds Bank*, The Times newspaper, January 15, 1908.)

Money is not available immediately it is paid in.

When
money is
available.

Even in the case of notes or gold, a sufficient period must be allowed to elapse, before drawing against it, to enable the bank to carry out the necessary book-keeping operations. (*Marzetti v. Williams*, 1 B. & Ad. 415; *Griffiths v. London County and Westminster Bank*, coram Lawrence, J., May 10, 1912.) But as soon as it is definitely credited, it is available. (See *The Gordon Case*, [1903] A. C., per Lord Lindley, at p. 249, *infra*; *In re Mills Bawtree and Co.*, 10 Morrell's Bankruptcy Cases, 192.)

When cheques
available.

With regard to cheques, the rule used, at any rate, to be that they were not available until, in addition to the interval reasonably required for book-keeping entries, the necessary period had elapsed for the cheques to be cleared, according to their respective nature, whether town or country.

Where the old practice of entering cheques as such, and of distinguishing between town and country cheques, is maintained, or where the customer is notified, by memorandum in his pass book or paying-in slip, that cheques will not be available until cleared or until the expiration of fixed periods, the old rule probably holds good; and, in the absence of any course of business entitling a particular customer to draw against uncleared cheques, cheques so drawn might be returned with the answer "Effects not cleared."

Credited as
cash.

Where the cheques have at once been credited as cash, and where there are no counteracting stipulations affecting the customer, the right to return cheques on the ground that the assets have not been cleared is,

in the light of the judgment of the House of Lords in *Gordon's Case* ([1903] A. C. 240), more than doubtful. CHAP. XII.

Lord Lindley says, at p. 249: "It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right." It is obvious from the context and the whole tenor of the judgment that this *dictum* includes the crediting of uncleared cheques as cash, to which indeed it was primarily directed. On the other hand, Bigham, J., in *Akrokkerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, appears to have held the contrary, but that case is distinguishable by reason of agreement when opening the account. In *Bevan v. National Bank*, 23 T. L. R. 65, Channell, J., held that in the absence of course of business, the customer was not entitled to draw against cheques merely credited as cash in the banker's books. Both these cases were subsequent to the *Gordon Case*, but any such view seems to run counter to the decision of the House of Lords in the *Gordon Case*. In *Re Farrow's Bank*, *The Times*, July 20, 1922, Astbury, J., said, "Since the Bills of Exchange Act, 1906, it was not arguable that the mere crediting of a cheque paid into a customer's account, independent of any arrangement between the customer and the bank, converted the bank into a holder instead of an agent within sect. 82 of the Bills of Exchange Act, 1882." True, he was dealing with a question of holder or agent; but the *dictum* seems confined to sect. 82, crossed and uncrossed cheques cannot be treated differently, and the statement is inconsistent with the judgment in *Sutters v. Briggs*. (See *ante*, p. 188.)

The right of the customer to draw against cheques so credited is, in fact, only the logical consequence of the position of holder for value which the bank acquires by such crediting. The value cannot consist in the mere entry in the bank books; it lies in the right thereby conferred to immediately draw against the amount; in the

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fact that the credit is an actual, available one. As to the real bearing of Bills of Exchange (Crossed Cheques) Amendment Act, 1906, see *post*, "The Collecting Banker."

If so credited in the pass book which is delivered to the customer there can, of course, be no question that the amount can be drawn against. (*Akrokerri, &c. Ltd. v. Economic Bank*; *Bevan v. National Bank, ubi sup.*) In *Holland v. Manchester and Liverpool District Bank*, 25 Times L. R. 386, Lord Alverstone, C.J., suggested that in case of mistake the account might be corrected after the amount had been drawn, but awarded damages for the dishonour of cheques before correction.

Retaining
balance to
meet bills
discounted.

Save, possibly, in the event of the customer's bankruptcy, the banker is not entitled to retain money standing to current account to meet contingent liabilities of the customer to him.

In *Bolland v. Bygrave*, Ryan & Moody, 271, Abbott, L.C.J., sitting at *Nisi Prius*, appears to have thought the banker's lien attached to securities of the customer when the banker had discounted bills for, or accepted bills for the accommodation of, the customer. He says: "It appears that, at this time, the bankrupts had discounted bills for T. to a large amount, which were still unpaid; that they had also accepted a bill for his accommodation to a large amount, not then due; and I think that a banker who stands in this relation to a customer has a lien upon any securities of that customer which may for any purpose be placed in his hands, and he has a right to retain them to countervail the liabilities he has so incurred on his behalf till those liabilities have ceased." As the banker's lien extends to money (*Misa v. Currie*, 1 A. C., at p. 569), this has been cited as an authority that bankers are entitled to retain monies to meet liabilities of this sort, and treat such monies as not available for drawing against.

This case was quoted to the Exchequer Chamber in

Barnett v. Brandao, 6 M. & G., at p. 654, when Lord Denman, C.J., said of it : " Some of the cases arising out of Marsh's bankruptcy (of which it was one) are not correctly reported " ; and Parke, B., said : " The whole of that case depends upon what is meant by depositing for safe custody." It was again quoted in argument in the same case in the House of Lords, 12 Cl. & Fin., at p. 798, but no special remark made upon it.

In *Agra and Masterman's Bank v. Hoffman*, 34 L.J., Ch. 285, Stuart, V.-C., granted an injunction restraining a customer from suing his bankers at law for damages for dishonouring his cheques, the bank contending that they had rightly retained the funds to answer the liability which might fall on them in respect of bills discounted by them for the customer, but not yet due. The injunction was granted mainly on the ground that there was a question to be tried in equity, and is not conclusive of the right ; moreover, as appears from a footnote, the matter was subsequently compromised on terms which included the payment by the bank of the customer's costs of the action at law and the suit in equity, as between solicitor and client, which is, at least, significant.

In *Jeffryes v. Agra and Masterman's Bank*, L. R. 2 Eq. 674, the last-mentioned case was cited to Sir W. Page Wood, V.-C. In his judgment he said : " The bankers say, further, that there were very heavy liabilities outstanding, and that they would have retained, when they became due, these balances as against those outstanding bills. I apprehend they never could do that in any court of law, and of course there is no equity of the kind ; you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time."

The matter was, however, set at rest in 1874 by the case of *Bowen v. Foreign and Colonial Gas Company*, 22 W. R. 740.

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There the customer had a credit balance on current account of £751. The bank had discounted bills for him, not yet due, for £500. A garnishee order having been served on the bank, based on a judgment against the customer, the bank claimed to retain £500 of the current account against the liability on the bills, alleging that they had a lien to that extent. The court held they had not. Lord Coleridge, C.J., said that here there was a cash balance; and the fact that the bankers had discounted bills for their customer which were still running was no ground for an implied agreement for a lien on the balance; indeed, it would be contrary to the object of such advances.

Brett, J., said that there was no evidence of custom or anything from which the Court could imply an agreement. It would be quite contrary to the regular course of such advances to adopt the view of the bank. A customer asks for discount in order to increase his drawing account. It was said the bank had a lien on the cash balance. If that was the case, there would be no use in discounting the bills.

Grove, J., said there was a great difference between the case of securities, as in the authorities cited (which included *Bolland v. Bygrave*), and a drawing account. A late decision to a similar effect is *Baker v. Lloyds Bank*, [1920] 2 K. B. 322.

It may therefore be taken as conclusively settled that the fact of a banker's having discounted for a customer bills still maturing gives him no right to retain any of the current account to answer the contingent liability on those bills, and on that ground dishonour cheques drawn against such current account.

It is different where the customer becomes bankrupt.

The liability of an indorser on a current bill, although contingent, is a provable debt in his bankruptcy (Bank-

Where
customer
is bankrupt.

ruptcy Act, 1914, s. 30), and any provable debt may be utilised for set-off as a mutual dealing or credit under sect. 31 of the Bankruptcy Act, 1914. The holder is not obliged to value his security, except for purposes of voting under the second schedule to that Act. The liability is sufficient to establish a mutual dealing or credit; and the banker would, on bankruptcy of the customer, be entitled to retain the whole or a portion of the current account equivalent to the amount of the bill. But the result is by virtue of Bankruptcy law, not of lien. (Cf. *Alsager v. Currie*, 12 M. & W. 751; *Baker v. Lloyds Bank*, [1920] 2 K. B. 322.)

*To be available the Money must be unincumbered
and due to the Customer*

Service of a garnishee order *nisi*, founded on a judgment against the customer, ties up the whole credit balance on current account, irrespective of the relative amounts of the judgment and the balance. (*Rogers v. Whiteley*, [1892] A. C. 118.) The effect is the same despite the decision in the *Joachimson Case* that the credit balance is not due from the banker until actual demand. The judgments in that case expressly specify that the remedy by garnishee process remains the same as before, though, as previously stated, the position appears somewhat illogical and inconsistent with previous authority.

That judgment further decides that, as monies in the banker's hands to a customer's credit do not constitute a debt due and payable until demand, the Statute of Limitations does not run in favour of the banker until such demand has been made.

A credit account which has been absolutely dormant for six years is therefore available for drawing purposes or for attachment by garnishee process.

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The banker's lien, where applicable, would probably entitle him to treat funds liable thereto as not available.

The banker would be entitled to retain funds to meet a cheque he had marked at the instance of his customer and treat such funds as not available for other drawing purposes. (See *ante*, "Marking Cheques.")

Answers on Cheques refused Payment

In every case where a cheque is refused payment, the answer thereon should, so far as consistent with truth, be framed in the form least calculated to damage the customer's credit.

There is probably no right in the ordinary holder to require a written or any answer. Where presented through the London Clearing House, the rules of that establishment require a written answer to be given, and it is usually done in all cases.

The answer on the cheque does not appear to be a legitimate element in the action for dishonour of the cheque, that being a pure action for breach of contract, to which the answer is not strictly relevant. The two claims, however, can be and sometimes are combined in one action, the claim as to the answer being framed in libel. They should be presented separately to a jury, though this rule has not always been observed. In *Szek v. Lloyds Bank*, The Times newspaper, January 15, 1908, the claim was for dishonouring four cheques and also for libel in writing "Refer to drawer" on such cheques. Grantham, J., told the jury that if they thought it a case for damages they would probably be disposed to award one sum which would cover the two claims for breach of contract and libel. The jury, however, did not do so, but awarded £250 damages for breach of contract and nothing on the claim for libel.

Of course there are many answers which cannot possibly be libellous or in any way hurt the customer's

reputation, such as are based on some irregularity in the form of the cheque or in the indorsements: "Requires confirmation," "Writing and figures differ," "Indorsement irregular," and so on.

"Refer to drawer" would seem by itself not to be libellous, though, as above stated, Grantham, J., left it to the jury in *Szek v. Lloyds Bank*. (Cf. *Flach v. London and South-Western Bank*, 31 Times L. R. 334.)

"N/S." brought no damages in *Cox v. Cox & Co.*, The Times, March 18, 1921, though it is a somewhat significant answer. "N/A.," where not justified, would be far more serious, because it might fairly be construed as implying that drawer was intentionally passing cheques on a bank where he had no account, and therefore no expectation of their being met, a criminal offence.

There does not seem to have been any very definite legal decision on any of these particular forms; most of the cases are of first instance, where learned judges may take somewhat individual views. The general rule seems to be that laid down by the Court of Appeal in *Frost v. London Joint Stock Bank*, 22 Times L. R. 760. There a cheque was returned unpaid to the holder by the defendant bank, which had presented it for him, with a slip attached by them bearing the words, "Reason assigned," and against these was written "Not stated." The drawer sued the bank for libel. Evidence was given that business men would interpret the slip as meaning that the cheque had been dishonoured for want of funds to meet it. The plaintiff recovered £50 for libel. The Court of Appeal reversed this decision and entered judgment for the bank.

In general terms they laid down that where words are not obviously and directly defamatory it is not what they might convey to a particular class of persons who, by reason of their calling, might attach a special significance thereto that is the test, but what they would

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ordinarily suggest to the mind of every person of average intelligence who read them. It may well be that some of the answers in daily use may have acquired special meanings or significance to business men, but it is deducible from this case that such mere technical construction is not sufficient to put a forced interpretation on words not in themselves defamatory.

An indorsee might possibly be libelled by the answer on a cheque.

To a question put to the Institute of Bankers whether a bank could return a cheque with the answer, "Indorsement forged," where they knew this to be the case, the Council, while saying the bank would be justified in so doing, said, "but the more judicious answer would be, 'Indorsement requires verification.'"

Determination of Authority to pay Cheques

"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by, (1) countermand of payment, (2) notice of the customer's death." (Bills of Exchange Act, 1882, s. 75.)

Stopping
cheques.

To constitute an effective countermand, it must come to the conscious knowledge of the banker, constructive countermand being unknown in mercantile matters. (*Curtice v. London City and Midland Bank*, [1908] 1 K. B. 293.) If it be by the negligence or default of the bank that such countermand fails to be effective the bank will be liable to the customer for any loss incurred thereby. (*Ibid.*)

An unauthenticated telegram purporting to come from the customer, stopping a cheque, is not sufficient to justify the banker in so serious a step as absolutely refusing payment. His proper course is to postpone payment, returning the cheque with an answer indicating the state of affairs and cause, so as not to damage the customer's credit, and requesting re-presentation,

and communicate with the customer asking for confirmation. (*Ibid.*) Presumably the same course should be adopted when a cheque is stopped by telephone, unless the banker can satisfy himself that the person communicating with him is really the customer. A stop to one branch of a bank is not an effective stop on a cheque drawn on another branch of the same bank. (*London Provincial and South-Western Bank v. Buszard*, 35 Times L. R. 142.)

One of several partners (*Grant v. Taylor*, 2 Hare, 413), trustees, or executors has power to stop a cheque given by any or all of the body. A banker paying a cheque after it has been effectively countermanded is liable to his customer for the amount. (*Twibell v. London Suburban Bank* (1869), W. N. 127.)

In the case of the customer's death, no specific form of notice is provided for, and there does not seem any authority on the point. Mere rumour would not be sufficient for the banker to act upon, but he could not safely disregard any fairly reliable information, such, for instance, as an announcement in a responsible newspaper. Although the property passes to the legal representatives on the death itself, the banker is justified as against them in payments made on cheques after the death but before notice thereof. (Cf. *Tate v. Hilbert*, 2 Ves. Jun. 111.)

Death of
customer.

As to the practical supersession of the customer's authority to draw cheques, and of the banker's obligation to pay them by circumstances indicating impending or possible bankruptcy on the part of the customer, see *ante*, "Current Account."

If the customer become absolutely insane, the banker should not honour his cheques. (*Drew v. Nunn*, 4 Q. B. D. 661. Cf. *Daily Telegraph Newspaper v. Loughlin*, [1904] A. C. 776.) Since the Lunacy Act, 1890, the fact that a man is confined as a lunatic is pretty

Insanity.

CHAP. XII. conclusive evidence of his insanity, as he cannot be detained without judicial or official authority for more than seven days, and even for that time only under very special circumstances.

Winding-up Where a joint stock company is wound up, either compulsorily or voluntarily, cheques drawn by directors subsequently to the commencement of the winding-up are not the cheques of the company. (*Bolognesi's Case*, L. R. 5 Ch. 567.) It is conceived, however, that the banker would be held justified in paying them until notice of the winding-up had reached, or could be imputed to, him. (Cf. *ante*, Special Customers.)

CHAPTER XIII

PAYING BEARER CHEQUES

“ A BILL is payable to bearer which is expressed to be Bearer bills.
so payable, or on which the only or last indorsement
is an indorsement in blank.” (Bills of Exchange Act,
s. 3, sub-s. 3.)

As to bills being payable to bearer when payee is a fictitious or non-existing person, see *ante*, p. 138. The question is not very material to the paying banker, by reason of his being protected against forged indorsements of order cheques. Either the cheque would be payable to bearer as being payable to a fictitious or non-existent person, or if the circumstances deprived it of this character, the indorsement, if not genuine, would be a forgery. Both defences might in fact be set up in the former case, as it is a forgery to counterfeit the name of a non-existent fictitious person.

By sect. 2, “ Bearer ” is defined as “ the person in possession of a bill or note which is payable to bearer,” and “ Holder ” includes the bearer of a bill or note.

Sect. 59 provides that a bill is discharged by pay- Discharge.
ment in due course by or on behalf of the drawee or acceptor, and defines payment in due course as payment made at or after the maturity of the bill to the holder thereof, in good faith and without notice that his title to the bill is defective.

It is somewhat curious that these last words do not specifically include the case of no title, as well as defective title, in the holder, as, for instance, is the wording in sect. 82. Possibly they are unnecessary ; notice that

CHAP. XIII. a man had no title would include notice of a defective title, on the principle of the greater including the less ; whereas there is good reason for specifying both in sect. 82. The case cited by Sir Mackenzie Chalmers (Bills of Exchange, 8th ed., p. 230), as authority that payment of a stolen bearer bill to the thief is a good discharge (*Smith v. Sheppard*, cited Chitty on Bills, 11th ed., p. 278, *n.*), is not a satisfactory one, the case being nowhere reported, the facts being that the bill was lost, not stolen, and the reason assigned being that it was the owner's fault that he lost it.

Definition of holder.

As shown above, however, the definition of holder in the Act merely requires "possession," without in any way limiting it to lawful possession, or involving any question of title ; and therefore payment in due course to the person in possession, even though he be the actual thief, operates as a discharge on the bill. Sir Mackenzie Chalmers (8th ed., p. 143) says that "a defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title and can give none. He is not the 'holder' of the instrument." It is submitted that these words only apply to the specific case of forged indorsement, which is a matter of special enactment under sect. 24. It would not be true to say that a person who has no title cannot be the "holder." Even where there is a forged indorsement, a man may be, for some purposes, a holder in due course. See sect. 55, sub-sect. 2 (b).

With regard to bearer cheques, the matter is made quite clear by the judgment in *Charles v. Blackwell*, 2 C. P. D., at p. 158. Speaking of lost or stolen bearer cheques, the Court say : "The matter is equally clear on principle, for where the banker paid the bearer of such a cheque, he obeyed the mandate of his customer, the drawer, and could charge him accordingly ; while, on the other hand, the customer was protected, and

this even though the bearer so paid had no property in the cheque, but was himself a thief who had stolen it. The drawer was entitled to say to the payee, 'I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid the amount to the bearer, and this the drawee has done.' "

Thus payment in due course by the banker of an uncrossed bearer cheque to anyone presenting it discharges not only the banker, but, if the cheque had reached the payee, discharges the drawer, both as to cheque and consideration.

The question has sometimes been suggested whether, notwithstanding the discharge of the cheque, the true owner could not, in this and similar cases, maintain an action against the banker for trover or conversion. A thief cannot acquire property in the cheque by stealing it; no one can acquire a valid title under a forged indorsement. The bank who pay a cheque to such a holder have dealt with the property in a way inconsistent with the rights of the true owner in whom the property and right of possession remain vested. Further, it is said that the bank cannot set up, that, being discharged, the cheque is a valueless article and the damages nominal, inasmuch as it was their own act that made it so.

Question of true owner maintaining conversion.

But in *Charles v. Blackwell*, 1 C. P. D. 548, the Divisional Court (Lord Coleridge, C.J., Brett and Lindley, JJ.) distinctly held that if the cheque was properly paid, neither trover nor conversion would lie against the banker; and the Court of Appeal, 2 C. P. D. 151, adopted this view (see p. 164), taking the additional ground that, on payment, the property in the cheque passed from the payee or those claiming through him.

It may be taken, then, that whenever a banker pays a cheque without contravening any statutory enactment, and in such a manner that, either at common law or by virtue of any statute, that payment, though

CHAP. XIII. made to an unlawful holder or possessor, operates as a discharge of the cheque, he is under no liability to the true owner for conversion or trover.

If he pays contrary to statutory enactment ; if, for instance, he pays a cheque crossed specially to more than one banker, not being crossed to an agent for collection being a banker, or if he pay so as to deprive himself of statutory protection, as, for instance, a cheque with a forged indorsement, contrary to the ordinary course of business, then his liability to the true owner remains, apart from any express right given to the true owner by statute ; and it would seem that the liability would be the full face value of the cheque, notwithstanding it might have been discharged, as in the case of a bearer cheque crossed as above mentioned. See *per* Blackburn, J., in *Smith v. Union Bank of London*, L. R. 10 Q. B. 291, at which date (1875) it must be remembered that there was a general statutory prohibition against paying crossed cheques contrary to the crossing, but there was no special remedy given to the true owner against the banker so paying ; while sect. 19 of the Stamp Act, 1853, contained no provision limiting the protection for payment on forged indorsement to payment in the ordinary course of business, as does sect. 60 of the Bills of Exchange Act, 1882.

The remarks of Blackburn, J., are couched in wide terms, but they must probably be confined to cases where the payment is made in contravention of some statutory provision, or in such a manner as to preclude it from being a statutory discharge. (See *Smith v. Union Bank of London*, in Court of Appeal, 1 Q. B. D., at p. 35.)

Where such payment is a contravention of the customer's order, as when a crossed bearer cheque is paid over the counter, the banker, in addition to his liability to the true owner, may be unable to debit the customer. (See *post*, "Paying Crossed Cheques.")

CHAPTER XIV

PAYING ORDER CHEQUES

THE principle to be borne in mind in dealing with this subject is that, in ordinary cases, the banker cannot charge his customer with any money with which he has parted without that customer's authority. If the customer says "Pay bearer," and the banker pays the bearer, that is a good payment as against the customer, though the bearer was not himself entitled to receive the money. But when the customer says "Pay A. B. or order," the mandate is only fulfilled by paying either A. B. or some person to whom A. B. has transferred his rights in manner authorised by the drawer, namely, by a genuine indorsement. The Bills of Exchange Act, s. 24, precludes the possibility of anyone acquiring title to the bill or its proceeds, or giving a valid discharge, where a forged indorsement intervenes. On both grounds, that of having paid contrary to instructions, and having paid a person not entitled to discharge, the banker, apart from statutory protection or estoppel, is not in a position to debit his customer with money paid on a cheque with a forged indorsement.

General position.

The statutory protection with regard to cheques is under sect. 60 of the Bills of Exchange Act, 1882; with regard to drafts and orders drawn on a banker, not strictly falling within the definition of cheques, it is under sect. 19 of the Stamp Act, 1853 (16 & 17 Vict. c. 59).

In *Bissell v. Fox*, 51 L. T. 663; 53 *Ibid.* 193, both the above provisions were treated as applying

CHAP. XIV. indiscriminately to cheques. It would seem, however, that, by the combined action of sect. 24 and sect. 60 of the Bills of Exchange Act, 1882, sect. 19 of the Stamp Act, 1853, is impliedly repealed, so far as cheques are concerned. (Cf. *Gordon's Case*, [1903] A. C., at p. 251.) The two sections are so dissimilar that they cannot possibly co-exist with reference to the same subject-matter, though they were treated as so co-existent in *Bissell v. Fox*, 53 L. T., N. S. 193.

There are, however, certain points in common between the two sections, which may be dealt with concurrently to show the elements essential for a document to come within either.

Requisites for protection.

The instrument must be a bill, draft, or order drawn on a banker, payable to order on demand.

Bill, draft, or order.

The document must be a bill, draft, or order.

The latitude of interpretation involved in the decision in *Gordon's Case* renders it difficult to fix any definite limitations on the documents which may fall within the extended scope of this definition.

A document may not be a cheque or bill, for want of some essential element, but the words "draft or order," of which there is no authoritative definition, are there to supply the deficiency.

Must be drawn on a banker.

The document must be drawn on a banker. By the decision in *Gordon's Case* this does not necessarily involve it being drawn by a customer. It may be drawn by a branch of a bank on another branch or the head office. As to orders drawn by local authorities on their treasurer at a bank, see *ante*, p. 160. This condition, however, absolutely excludes bills accepted payable at a banker's or domiciled with him. Such bills, even if payable on demand and to order, are not drawn on a banker.

Must be payable to order and negotiable.

The document must be payable to order. This seems to involve the necessity of the document being negotiable. A document cannot be payable to order unless

any indorsee has a right to sue on it by virtue of his own independent title, which is the essence of negotiability. CHAP. XIV.

This is further emphasised by the reference to the indorsement of the payee and subsequent indorsers, if any, which occurs in both enactments, words only applicable to an instrument negotiable by indorsement.

The banker's draft in *Gordon's Case*, though not a bill, because drawer and drawee were the same person, was yet an instrument which, both at common law (*Miller v. Thomson*, 3 M. & G. 576) and under the Bills of Exchange Act, s. 5, sub-s. 2, must be treated as negotiable, either as a bill of exchange or as a promissory note.

The *Gordon* decision, therefore, does not militate against the restriction that the instrument must be negotiable.

Anything which would be fatal to the character of a document as a bill in the hands of a holder in due course is sufficient to exclude it from protection under either section.

The instrument must, therefore, be unconditional, in the sense in which the term is used in the Bills of Exchange Act, which, in this respect, merely reproduces pre-existing law. Must be unconditional.

This requirement would exclude all documents requiring the signature of a specific receipt as a condition of payment, the sort of documents covered by sect. 17 of the Revenue Act, 1883 ; apart from the special provision in that section that such documents are not negotiable instruments. (See *ante*, p. 146.) Lord Lindley says at p. 252 of the *Gordon Case*, [1903] A. C. 240, speaking of documents of this class, "Nor do they come within sect. 19 of the Stamp Act of 1853, which, as I have already observed, applies only to banks which are drawees." The documents in that case were not drawn on the appellant bank, and so the section obviously afforded no defence.

CHAP. XIV. It would not be fair to interpret this somewhat ambiguous *dictum* as an authority one way or the other. (See *ante*, p. 149.)

It would exclude all instruments ordering payment out of a particular fund. (Bills of Exchange Act, s. 3, sub-s. 3.)

The requirement that the document shall be payable to order has another result.

If it is a bill within the Bills of Exchange Act, it is sufficient if it be expressed to be payable to order of a specified person, or to him or his order, or to him, without words prohibiting transfer. (Sect. 8.)

Under Stamp Act must be expressed to be to order.

But if protection has to be sought under sect. 19 of the Stamp Act, 1853, it can only be obtained where the draft or order is expressly made payable to the order of a specified person, or to him or his order.

Sect. 8 of the Bills of Exchange Act only applies to documents which are bills within its meaning, leaving other drafts and orders still regulated by the pre-existing law, which required the express addition of the word "order" to render the instrument transferable or payable to order.

Must be payable on demand.

The document must be payable on demand.

This would, apart from any question of negotiability, presumably exclude all documents which, though stated to be payable on demand, contained a restriction that they would only be paid if presented within a specified period. How far this requirement excludes documents which, though stated or implied to be payable on demand, contain a restriction that they will only be paid if presented within a specific period, has been previously discussed. (See *ante*, p. 120.) In *Thairlwall v. Great Northern Railway*, [1910] 2 K. B. 509, a Divisional Court held that such a provision did not render the document conditional. The question was not, however, raised there whether the intimation was addressed to the

drawee or only to the payee, and this might well prove the deciding factor in any future and similar case. CHAP. XIV.

It would not exclude a post-dated cheque, though known to be such, if presented on or after the ostensible date ; the legality of such instruments being fully established by the Bills of Exchange Act, s. 13, sub-s. 2, they must clearly be treated as payable on demand. (See *ante*, under heading "Post-dated Cheques.")

In treating further of the protection of the paying banker against forged indorsements, it becomes necessary to deal separately with sect. 60 of the Bills of Exchange Act and sect. 19 of the Stamp Act, 1853, by reason of the divergence of their terms. Divergence of the statutory enactments.

Take sect. 60, first, as of the more general application. It must be borne in mind that this section only refers to documents which are properly bills or cheques within the meaning of the Bills of Exchange Act. It provides that, to entitle him to its protection, the banker must pay the cheque "in good faith and in the ordinary course of business." Provisions of sect. 60.

Payment need not be by the absolute transfer of money or money's worth to the holder. The word "payment" in the Act is largely interpreted. (See *Glasscock v. Balls*, 24 Q. B. D., at p. 16.) In *Meyer v. Singapore Bank*, [1913] A. C. 847, the Privy Council held that where a bank paid across the counter a crossed cheque by giving its own cheque on another bank, this was payment of the cheque within sect. 81. Definition of payment.

Where a cheque drawn on one branch of a bank was paid in at another and appeared as an item in balancing the accounts between the two branches, the branch on which it was drawn was held to have paid it within the meaning of sect. 60. (*Gordon v. London, City and Midland Bank*, [1902] 1 K. B. 242. Cf. *Bissell v. Fox*, 53 L. T., N. S. 193.)

But it may be safely asserted that the intimation

CHAP. XIV. that the cheque will be paid, known as notifying its fate, in answer to an inquiry by another banker, would not be treated as payment, though often regarded as equivalent thereto by bankers. If, after giving such answer, the paying banker became cognisant of facts tending to throw doubt on the genuineness of the indorsement, he would subsequently pay the cheque at his peril. The only light in which courts regard the question and answer as to the fate of a cheque is that of a precaution taken by the collecting banker exclusively in his own interest and for his own benefit. (See, *e.g.*, *Bissell v. Fox*, 51 L. T., N. S. 663 ; 53 L. T., N. S. 193 ; *Ogden v. Benas*, L. R. 9 C. P., at p. 516.)

Must be in good faith and ordinary course of business.

The payment must be "in good faith and in the ordinary course of business." (Bills of Exchange Act, s. 60.)

Question of negligence.

It is difficult to conceive, still more to formulate, conditions involving absence of good faith on the part of a corporation, such as a Joint Stock Bank, with relation to paying cheques. Sect. 60 does not, as does sect. 80, with regard to the banker paying, and sect. 82 with regard to the banker collecting, a crossed cheque, make the absence of negligence a condition of the protection. Negligence is not incompatible with good faith. Bills of Exchange Act, s. 90 : "A thing is done in good faith within the Act if it is done honestly, whether it be done negligently or not." This sect. 90 was presumably inserted to set at rest doubts which were at one time entertained as to whether negligence on the part of the transferee of a negotiable instrument was sufficient to affect him with equities thereon ; but it is general in its terms, and the banker is entitled to any benefit derivable from it. As before stated (p. 199), there is authority for the proposition that a banker cannot charge the customer with losses incurred by the banker's negligence ; indeed, such is only the natural result of the relation of agent to

principal. The omission of any reference to negligence in sect. 60, whereas it is included in sect. 80, possibly excludes any question of negligence in the particular case of forged indorsement, save in so far as the negligence consists in departure from ordinary course of business.

Negligence may, of course, be so gross as to be evidence of want of good faith, but that is not a principle likely to be applicable in the case of a banker.

As to ordinary course of business, there are some obvious derelictions. Payment of a crossed cheque contrary to the crossing would never be in the ordinary course of business. As to payment of an order cheque presented unindorsed by a person who writes payee's name on the back at request of the bank, see *ante*, p. 133.

Ordinary
course of
business.

In the majority of cases, however, the usual course of business is a matter on which bankers are best qualified to judge, and courts would be largely influenced by the evidence of persons experienced in banking on such questions.

But "ordinary course of business" must be the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks (cf. *Rickford v. Ridge*, 2 Camp. 537; *Lloyds Bank v. Swiss Bankverein*, 29 Times L. R., at p. 222); and a court, while according weight to the evidence of bankers, might well reject anything which savoured of rashness or indifference to the interests of the customer or true owner. The court might either decline to believe it to be the usual course of business or would import into the section that the course of business must be not only usual but reasonable.

A difficult question might, for instance, arise whether a banker, who had paid over the counter without hesitation or inquiry a large sum on a cheque with a forged indorsement, to an obviously suspicious and unlikely person, was acting in the ordinary course of business.

Payment over
counter of
large sums.

CHAP. XIV. The banker would say that in the ordinary course of business, and even under judicial authority (see *ante*, p. 212), he was bound to pay or refuse at once.

The customer or true owner would say there were exceptions to every rule, would refer to the case of countermand by telegram justifying postponement (*ante*, p. 228), and quote Lord Halsbury in *Vagliano's Case*, [1891] A. C., at p. 117, where he said: "I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur necessarily giving rise to suspicion. I can well imagine that on a person presenting himself whose appearance and demeanour was calculated to raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that, whether the document were a cheque payable to bearer for a large amount or a bill, the counter clerk and banker alike would hesitate very much before making payment." The truth seems to be, as rather suggested by Lord Halsbury, that there can be no ordinary course of business in face of extraordinary circumstances, and that, in default thereof, any course of action consistent with reasonable care and prudence will be accepted as an efficient substitute.

The mere internal formalities of banking do not probably count for much in the ordinary course of business exacted by the section. Absence of the usual collecting banker's stamp, for instance, would not imperil the banker's position.

Presentment
by post.

Presentment for payment by post is sufficient where authorised by agreement or usage (sect. 45 (8)), but it is not the custom of bankers to comply with a letter from an unknown private person enclosing a cheque

ostensibly indorsed, and asking for the amount to be remitted in notes by post. Were the notes sent, the payment would presumably not be in the ordinary course of business.

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A curious question might arise if a well-known and respectable man came to a bank and said he was payee of an order cheque on that bank, describing it fully, that before he had indorsed it, it had been stolen from him, that consequently any indorsement purporting to be his must of necessity be a forgery, that he was unable for the time being to communicate with the drawer, and asked the bank to refuse payment of the cheque if presented. Before the bank can consult the drawer, the cheque is presented, ostensibly indorsed by the payee. A cheque can, of course, be regularly stopped only by the drawer. If the payee's statements were untrue and the bank refused payment, they would be liable to the customer for damage to credit. If those statements were true, and the bank paid the cheque when so presented, they would have to show as against the payee that the payment was in good faith and in the ordinary course of business.

Payee wanting to stop cheque.

Indemnity would be an insufficient protection either way, for obvious reasons.

The cheque must purport to be indorsed by or under the authority of the proper person.

Correctness of indorsement.

There used to be a superstition that the paying banker was not concerned with the indorsements on an order cheque. Such an idea is, of course, utterly opposed to the whole drift of sect. 60, and if a patent irregularity in the indorsements were overlooked or disregarded by the banker, it would be hopeless for him to invoke the protection of sect. 60. If, for instance, there was a special indorsement following a blank indorsement, he would be bound to have or get the indorsement of the special indorsee.

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The indorsement must be a signature or the corresponding execution in the case of a corporation. "It must be written on the bill itself and be signed by the indorser. The simple signature of the indorsee, without additional words, is sufficient." (Sec. 32 (1).) A cheque payable to Mrs. A. B. is not properly indorsed "Mrs. A. B."; one payable to "General C. D." is not properly indorsed "General C. D."; on one to the "Duke of E.," "Duke of E." would be rejected as an indorsement. These are not signatures, nor do they "purport to be," within sect. 60. A bill may be payable to the holder of an office for the time being or order, but the payee cannot sign by merely affixing the title of his office; he must sign his name and add his description, tallying with the form in which the cheque is made payable to him.

Some banks seem to entertain very broad views as to the correspondence of the indorsement with the designation of the payee. Of some of the indorsements passed it would be impossible to say that they "purport to be" the indorsement of the payee; others may so purport, but in such form that payment thereon is hardly in the ordinary course of business. Other banks seem over-scrupulous in returning cheques on account of utterly immaterial variations or omissions. In particular the punctiliousness sometimes exhibited with regard to the indorsements of married women strikes one as somewhat exaggerated. A cheque to "Mrs. A. B.," according to some banks, must be endorsed with the wife's Christian and surname followed by "wife of So and So B.," and there are all sorts of refinements as to widows, and cheques payable to married women under their maiden names. Save possibly in the last instance, where there is a substantial variation, the ordinary signature would surely be sufficient. It would be futile to endeavour to deal here with specific instances. A large collection of examples will be found in "Questions on Banking Practice,"

7th ed., with the opinion of the Council of the Institute on each. CHAP. XIV.

There is one form of indorsement which must, however, be referred to, because it is not uncommonly passed, and can only be justified by the comity of bankers. A cheque payable to A. B. or order is presented for payment without any indorsement by A. B., the only indorsement being "Placed to account of payee," or words to that effect, signed by or on behalf of a banker. This does not even purport to be the indorsement of the payee, and payment thereon cannot be in the ordinary course of business.

In foreign cheques it sometimes happens that the name of a payee or special indorsee is expressed in English letters, while the place of the indorsement is occupied by Arabic, Hindustani, or some other characters totally different. Unless the banker has personal knowledge of the particular language, it would seem doubtful whether the mere position on the cheque of hieroglyphics conveying nothing to his mind brings the case within sect. 60. The "good faith" has no intelligent basis, the characters scarcely "purport" anything to one to whom they convey no meaning, and "the ordinary course of business" would suggest verification. As Buckley, L.J., said in the *Carlisle and Cumberland Bank Case*, [1911] 1 K. B., at p. 496, "If a document were presented to me written in Hebrew or Syriac, I should for the purposes of the document be both blind and illiterate, blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it."

Indorsement
in foreign
characters.

Such indorsements are the subject of a memorandum by the Council of the Institute of Bankers published in the *Journal*, vol. xxxi., p. 468.

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Signatures by Deputed Authority

The indorsement or other execution of bills and cheques by a company is regulated by sect. 77 of the Companies (Consolidation) Act, 1908. "A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of or by or on behalf or on account of the company by any person acting under its authority."

It is therefore a perfectly sufficient indorsement of a cheque payable to the company if it be indorsed simply with the name of the company, so long as it agrees with the description of that company as payee. Sect. 60 draws no distinction between the indorsements of companies and individuals. If, therefore, the authority is lacking, the defect is supplied by that section. Bankers, however, while admitting that the mere name of the company is a sufficient indorsement in law, regard it in practice as irregular, and claim that bills and cheques should be indorsed "per pro." the company, the actual signatory appending his official position to his name by way of credentials. It is not easy to see the justification or object of this course. The mere name being sufficient, the introduction of the agent and his qualification would seem to import an element of doubt as to whether the qualification so expressed is such as normally to entitle its possessor to indorse cheques for the company. Sect. 25, when it speaks of "a signature by procuration" operating as notice that the agent has only a limited authority to sign, presumably includes any signature which, *ex necessitate rei*, is appended by deputed power, and would cover the case of the mere name of a company which, as an entity, has no corporeal functions. Sect. 60 is, very likely, unaffected by sect. 25, as sect. 82 was declared to be in *Morison v. London County and West-*

minster Bank, [1914] 3 K. B. 356. At the same time the Court there suggested that the "per pro." signature might necessitate extra precaution on the part of the collecting banker. The absence of any condition as to negligence in sect. 60 and the impossibility of the paying banker going beyond the ostensible regularity of the indorsements render this reservation less applicable to sect. 60 than to sect. 82. It therefore seems a pity to import anything which may grow into a course of business entailing extra responsibility on the banker.

In *In re Birmingham Bank*, L. R. 3 Ch. 653, Page Wood, L.J., said: "Liquidators might well meet and give an authority to someone. Yet that must be as to the acceptance of a specific bill or other specific thing which is to be done, and they may then say that their clerk or agent, whoever it may be, shall sign for them or, it may be, impress a printed mark which may be taken for their signature." There would seem here to be recognition of the substituted use of an actual signature even in its crudest form. (See also *Chapman v. Smethurst*, [1909] 1 K. B. 927.)

Both for company or private signatures, and apart from the question of the use of the mere name of the former, there have been various opinions as to whether there is any difference in significance or effect between the respective forms of expressing the delegated authority, now in common use. It is contended that "per pro." has some particular efficacy as importing a definite allegation of deputed power not to be deduced from "for" or "on behalf of," or any other analogous form. (See "Questions on Banking Practice," 7th edit., Question 789.)

Up till quite recently, the only authority on which such contention rested was *O'Reilly v. Richardson*, 17 Irish Comm. Law, 74, of which Chalmers says (8th edit., p. 88): "In an Irish case (citing this one) a distinction

CHAP. XIV. is drawn between an acceptance signed p.p. J. B., T. S., and one signed For J. B., T. S. The distinction does not seem founded on any clear principle. The case can be supported on other grounds." (See cases there cited to the contrary.) But in his dissentient judgment in *McDonald v. Nash*, Court of Appeal, July 27th, 1922, Scrutton, L.J., says: "The other point is that F. W. Nash, who signed for Nash & Co., had no authority to sign in that way, and that the form 'for' gave notice of agency and put the other parties on enquiry. This is the effect of the signature 'per pro.' under sect. 25 of the Act. On this point I refer to the careful judgment of Chief Baron Pigott in *O'Reilly v. Richardson*, with which I agree. He limits the cases in which one is put on enquiry to cases where the form of signature shows a special and limited authority as 'per procuration' or 'under power of attorney,' and excludes cases of a general authority as 'A. for B.'" The other L.JJ. decided on grounds which made this point immaterial, and they did not deal with it. This was a case of taking a bill as transferee in which sect. 25 operates. So far, at any rate, as sect. 60 is concerned, a signature which imports a general authority is as good as, if not better than, one which imports a special or limited one.

Position of
per pro.

There are further differences of opinion as to the proper form of a definite "per pro." signature. "Per pro. James Brown, John Smith," is said to be correct. "James Brown, per pro. John Smith" is said to be wrong. And yet, if the object is, as it must be, to get as near an actual signature as possible, one would think the latter form the more appropriate, as meaning "This is the signature of James Brown affixed by his authority by me, John Smith," whereas the former might fairly be interpreted, "By the authority of James Brown I sign myself John Smith."

If the Latin of the "per procuracionem" be extended to the signatures, this seems to be the legitimate interpretation. CHAP. XIV.

The A. B. per pro. C. D. sequence is the one common in Scotland and in Canada.

It is to be noted that in *Charles v. Blackwell*, 2 C. P. D., 151, the very case to which bankers owe the extension of their immunity under sect. 60 to "per pro." indorsements, the words "per pro." occur between the two names, not before that of the principal.

It is probably unnecessary to say that sect. 60 affords no protection whatever to the banker where the customer's signature as drawer is forged. A document purporting to be a cheque, but to which the drawer's signature is forged, is not a cheque at all, is not drawn on a banker (*Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49), and is outside the section altogether. (See also *Vagliano's Case*, [1891] A. C. 107; *Orr v. Union Bank of Scotland*, 1 Macq., H. of L. Ca. 513.)

Drawer's
signature
forged.

The foundation of the protection of the banker against forged indorsement has been frequently stated to be the impossibility of his knowing the signatures of all persons indorsing order cheques drawn by his customer. Often this statement occurs in contrast to one to the effect that a banker "is or ought to make himself acquainted with the signatures of his own customers" (see, e.g., *Charles v. Blackwell*, 2 C. P. D., at p. 156). If this implies legal obligation, it would afford another reason why the banker should not be protected against forgery of his customer's signature. Later cases (e.g. *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7) expose the fallacy of there being any such legal duty, or deception of the banker by a cunning forgery being a breach of it or constituting negligence, and leave the banker's inability to charge his customer on the true ground of payment without authority.

Knowledge of
customer's
signature.

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The case of a genuine cheque "pay self or order" with the customer's indorsement forged, is not likely to occur. If it did, it might re-open the above question. Drawer may be payee (sect. 5 (1)) and the transaction would be technically within sect. 60.

Banker's
double
risk.

In any case where a banker, in paying an order cheque with a forged indorsement, so acts as to deprive himself of the protection of sect. 60, he would appear to stand to lose the money twice.

He is not entitled to charge his customer with the money paid on the forged indorsement, so he loses that.

Then he would be liable to the true owner, if, as he probably would be, he is a person other than the customer, in trover or conversion for wrongfully dealing with the cheque, the damages for which would be its full face value.

Neither the property nor the right of possession is divested out of the true owner by the forgery of his indorsement.

The payment, therefore, was to an unlawful holder, and, unless protected or operating as a discharge of the cheque, constitutes a conversion. (See *Smith v. Union Bank of London*, L. R. 10 Q. B., per Blackburn, J., at p. 296, and 1 Q. B. D., at p. 35, per Lord Cairns.)

It is true that where a cheque is duly paid or discharged, conversion will not lie against the banker. (*Charles v. Blackwell*, 1 C. P. D. 553.) But to constitute payment on a forged indorsement payment or discharge under sect. 60, it must be made strictly in accordance with the terms of that section.

Artificial
discharge.

In any case the discharge is a purely technical and exceptional one.

Sect. 59 provides that "a bill is discharged by payment in due course by or on behalf of the drawee or acceptor. Payment in due course means payment made at or after the maturity of the bill to the holder

thereof, in good faith and without notice that his title is defective.”

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By sect. 2 “holder” is defined as the “payee or indorsee of a bill, or note, who is in possession of it, or the bearer thereof.”

Sect. 24 declares the total inefficiency of a forged indorsement to convey any title or the right to give a discharge.

The person in possession under a forged indorsement is, therefore, neither payee, indorsee, nor bearer; payment to him can never be payment in due course, or operate as a discharge or a valid payment, except where sect. 60 takes effect, and the banker is deemed to have paid the cheque in due course. “Deemed” in this connection must be read as importing the equivalent of the actual fact, and as putting matters on precisely the same basis as if the payment had been made in the manner in which it is deemed to have been made, such construction being necessary for the efficacy of the section. (Cf. *Hill v. East and West India Dock Co.*, 9 A. C. 448.)

No holder under forged indorsement.

The apparent possibility of an exception to the absolute inefficiency of a forged indorsement to constitute a holder, arising from the application of the words “holder in due course,” in sect. 55, sub-sect. 2 (b), to a person in possession of a bill in the course of negotiation of which there is, *ex hypothesi*, at least one forged indorsement, is explainable, and does not touch the general principle.

Apparent exception explained.

The term is there only used to denote the character in which a person must have taken the bill, namely, in good faith and for value, and before it was overdue, in order to enable him to maintain a right of recourse by estoppel against an indorser subsequent to the forged indorsement. Such subsequent indorser is precluded from denying to such person in possession the status of

CHAP. XIV. holder, so far as claiming against himself on the dishonoured bill is concerned ; but this does not touch the main question or imply that payment to such a person by drawee or acceptor would be a valid discharge of the bill.

Therefore, it remains that, save where strictly in accordance with sect. 60, payment of a cheque with a forged indorsement does not constitute payment or discharge of the instrument, relieve the banker from liability to conversion at the suit of the true owner, or entitle him to debit the customer.

Crossed
cheque with
forged
indorsement.

In the case of a crossed cheque bearing a forged indorsement, the banker is protected, in proper cases, both by sect. 80 and by sect. 60, equally against his own customer and against the true owner ; but inasmuch as sect. 80 limits the protection by the requirement of good faith and the absence of negligence on the part of the banker, it is obvious that conduct amounting to a violation of the ordinary course of business, within sect. 60, would, as negligence, equally debar the banker from the benefit of sect. 80. Nor could the banker, who paid a cheque with a forged indorsement, contrary to the crossing or the ordinary course of business, set up against the true owner the line of defence suggested by *Charles v. Blackwell*, 2 C. P. D. 151, namely, that the document, if recovered, would be valueless, inasmuch as its subsequent non-payment on presentation would not be dishonour, such non-payment being on the ground only of previous payment, effective by statute, though to the wrong person ; and that, therefore, there was no right of recourse against the drawer or any previous indorser.

The cheque with forged indorsement, paid contrary to the crossing or ordinary course of business, is not discharged, because the previous payment was not in accordance with the section ; but the true owner could not sue any party, either on it or on the consideration, until the cheque has been presented and dishonoured. The true owner cannot present it, because the bankers

have got it, or had and parted with it; therefore he is entitled to sue them in damages for its conversion. And if they had to pay its face value as such damages, there still seems no legal ground on which they could charge the amount against the customer. It would not be in law payment of the cheque, or payment on the cheque; but merely damages for a wrong of the banker's own, in its nature as separate from any question of the drawer's relation to the cheque as if it had been an assault. CHAP. XIV.

Charles v. Blackwell, 2 C. P. D. 151, seems to contemplate the possibility of the banker's returning the cheque to the true owner as a means of escaping liability for conversion. If the banker still had it, he might do this; the cancellation of the drawer's signature might be shown to have been made under mistake (sect. 63, sub-sect. 3), and the cheque might be paid on indorsement and re-presentation unless stopped meantime. If it had been stopped and payment were refused, the true owner might recover against the drawer. Possibly thus the banker might escape the second loss, but the true owner might well decline to take the cheque back; it is not a case in which the Court would stay his action. The banker might try to arrange with true owner to take it back and indorse it for value to him, present it to himself and pay: if stopped, sue the customer. These are, however, rather counsels of desperation.

If the cheque were not crossed, action against the banker by true owner is pure conversion: payment of full value as damages vests the property in the banker. If crossed, action is either conversion or special under sect. 79. Either way the true owner could not get his money again from the customer, and it would be unreasonable and shabby in the customer if he refused in such case to be debited.

Where the payment, although on a forged indorsement, is strictly in accordance with sect. 60, and, if the

Protected
payment
discharges
drawer.

CHAP. XIV.

cheque is crossed, with sect. 80, the payment, though, as before stated, only technically a payment in due course, not only discharges the banker, but, if the cheque had actually or constructively reached the payee, discharges the drawer from liability, not only on the cheque, but also on the consideration given for it. This is well illustrated in *Charles v. Blackwell*, 5 C. P. D. 151. The payee cannot sue, either on the cheque or the consideration, until the cheque is dishonoured. If he had it and presented it, true it would not be paid; but only, as before stated, on the ground that it had been previously paid, which is not dishonour. The payee says, "Yes, but to the wrong person." The drawer says, "You were content to take for your debt a document which would be discharged if the banker paid it in accordance with existing law, and this he has done, and you cannot complain." The same reasoning would lie in the mouth of any indorser.

Documents
within the
Stamp Act,
1853, s. 19.

Turning now to sect. 19 of the Stamp Act, 1853, which regulates the protection of the banker with regard to drafts or orders, not being cheques or bills within the Bills of Exchange Act, that section does not contain any words requiring the payment to be made in good faith or in the ordinary course of business. It simply provides that if the draft or order shall, when presented for payment, purport to be indorsed by the person to whom it is drawn payable, it shall be a sufficient authority to the banker to pay the amount to the bearer, and it shall not be incumbent on the banker to prove that any indorsement was made by, or with the authority of, the payee or subsequent indorsers.

It is, at any rate, clear that the payment must be made in good faith. The banker could never be allowed to take advantage of his own wrong, and the necessity of good faith is distinctly postulated in *Hare v. Copland*, 13 Ir. C. L. R., at p. 433, and by Blackburn, J., in *Smith v. Union Bank of London*, L. R. 10 Q. B., at p. 296.

Ordinary course of business, apart from the question of negligence (as to which see *ante*, p. 199), does not seem a factor. In *Bissell v. Fox* (53 L. T. N. S. 193) a payment treated as doubtful under sect. 60 was held good under this section. No such condition is included by Sir Mackenzie Chalmers in his "Digest of the Law relating to Bills, Notes and Cheques," published before the passing of the Bills of Exchange Act, or insisted on by Blackburn, J., in the passage above referred to. Nor is it referred to in *Charles v. Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151. The document in the *Gordon Case* ([1903] A. C. 240) was a draft drawn by a branch bank on head office. The issue of such drafts is a recognised means of transmitting funds from abroad, and is not uncommon in England. The subsequent payment might, therefore, be fairly regarded as being in the ordinary course of business, but the point was not raised or discussed.

As to foreign drafts being within sect. 19 of the Stamp Act, 1853, see *ante*, p. 151.

As to the indorsement purporting to be that of the payee or subsequent indorser, the same rules apply as in the case of cheques.

Sect. 19 of the Stamp Act, 1853, does not, as does sect. 60 of the Bills of Exchange Act, specifically provide that the banker who acts within its conditions shall be deemed to have paid the bill in due course, notwithstanding the forged or unauthorised indorsement. In such case, however, the section does operate as a discharge of the draft or order (*Halifax Union v. Wheelwright*, L. R. 10 Ex., at p. 194), with the same results as are enumerated with respect to sect. 60, *ante*, p. 253.

The section, like sect. 60, has full effect though the indorsement is "per pro." (*Charles v. Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151.) Indeed, that decision was on this section of being before the Bills of Exchange Act.

CHAPTER XV

PAYING CROSSED CHEQUES

As being specially material with reference to this subject, it may be well to repeat that “banker” is throughout to be read in the light of the definition of the term hereinbefore given under the heading “The Banker.”

In 1856, the statute 19 & 20 Vict. c. 25 enacted that where a draft on any banker made payable to bearer or order on demand bore across its face an addition, in written or stamped letters, of the name of any banker or of the words “and company” in full or abbreviated, either of such additions should have the force of a direction to the bankers upon whom such draft was made that the same was to be paid only to or through some banker, and the same should be payable only to or through some banker.

In *Simmons v. Taylor*, 4 C. B. N. S. 463, it was held that such addition was not a material part of the cheque and operated only as a direction to the banker on whom the draft was drawn.

The Crossed Cheques Acts of 1858 (21 & 22 Vict. c. 79) and 1876 (39 & 40 Vict. c. 81), the latter of which repealed the former and the Act of 1856, and is itself repealed by the Bills of Exchange Act, 1882, each contained a direct prohibition forbidding a banker to pay any crossed draft or cheque otherwise than in accordance with the crossing general or special as defined in those Acts. (See Crossed Cheques Act, 1858, ss. 1 and 2; Crossed Cheques Act, 1876, s. 7.)

For some not very apparent reason, this prohibition is omitted in the Bills of Exchange Act, 1882, being

only reproduced with reference to a cheque crossed specially to more than one banker except when crossed to an agent for collection being a banker (sect. 79 (1)). The inclusion of this prohibition makes the omission of the others still more remarkable. The remedy given to the true owner by sect. 79 (2) cannot be in substitution for the direct prohibition, since it co-existed with it in the 1876 Act. It has been suggested that the general prohibition has been dropped to get rid of the technical criminal liability of anyone who infringes a statutory provision for breach of which no specific penalty is enacted ; but if so, it is difficult to see why the direction to refuse payment is retained in the case of the cheque crossed specially to more than one banker. Such criminal liability is also too remote a possibility to constitute a practical factor in legislation.

Apart, however, from direct prohibition, the remedy given to the true owner, the deprivation of protection, and the fact that a banker paying a crossed cheque in contravention of the crossing cannot charge his customer with the amount, even, it would seem, though he has paid the true owner, inasmuch as he has paid contrary to the mandate of that customer, either direct or deputed by force of the Act to the holder, are sufficient to restrain the paying banker from disregarding any crossing.

Whether a crossing put on by a stranger or a person in possession under a forged indorsement, who is not the holder, constitutes the cheque a crossed cheque, has been already discussed.

It will be noticed that the proviso to sect. 79 does not provide for or cover this case.

The paying banker would, however, be protected in any case if he paid in accordance with the ostensible crossing ; with respect to a bearer cheque, as having paid it legally and properly ; with regard to an order cheque, by sect. 60.

CHAP. XV.

Crossed to
two bankers.

As above stated, the direct prohibition is now confined to the case of a cheque crossed specially to more than one banker, except when crossed to an agent for collection being a banker (sect. 77 (5), sect. 79 (1)). The limit of special crossings is two, and it would seem to be incumbent on the paying banker to satisfy himself that the second banker is the accredited agent of the first.

Liability to
true owner.

With regard both to cheques so crossed and all other crossed cheques, sect. 79 (2) enacts that a banker paying in contravention of the crossing "is liable to the true owner for any loss he may sustain owing to the cheque having been so paid." Payment is not defined. In *Meyer v. Singapore Bank*, [1913] A. C. 847, payment of a crossed cheque over the counter by the bank's own cheque on another bank was held payment for this purpose.

It is open to question whether this section confers on the true owner any further or other powers than he would have independently of it.

Apart from its provisions, the banker who paid a crossed cheque with a forged indorsement, contrary to the crossing, would lose the protection of sect. 60, as not having paid in the ordinary course of business, and would be liable to the true owner. In the case of a bearer cheque paid to a wrongful holder, prior to 1882, the banker would have been liable to the true owner, apart from this section, because he would have paid the cheque contrary to the direct prohibition contained in the 1876 Act, and so conversion would lie. With regard to bearer cheques since 1882, the question would be, apart from this section, whether the improper payment which leaves the banker open to be sued by the true owner must be one directly contrary to statute as distinguished from one contrary to business rules and the manifest intention of a statute. Possibly the former

is the true construction, but inasmuch as the special remedy is expressly given to the true owner by sect. 79 (2) the question is not material. CHAP. XV.

The only person to whom any remedy is given by sect. 79 (2) is "the true owner," a term not defined by the Act. Cf. *post*, p. 276. There cannot be, at the same time, two true or lawful owners of a cheque, and a holder in due course must always be the true owner thereof, unless the cheque be crossed "Not negotiable," to the exclusion of any previous holder, notwithstanding the cheque has been stolen or got by fraud from such previous holder by a person other than the holder in due course. (*Smith v. Union Bank of London*, 1 Q. B. D. 35.) The true owner.

Contrary to his original view, Sir Mackenzie Chalmers seems now of this opinion. In the 9th edit. p. 300, note (2), he quoted *Smith v. Union Bank of London*, and says, "Is not the holder in due course the 'true owner'?" In that case a bearer cheque, crossed to the *London and County Bank*, was stolen. It got into the hands of a holder in due course who obtained payment through another bank. Lord Cairns said, delivering judgment, "We must say that the holder of the cheque, who presented it to the defendants, was the lawful holder, entitled to retain it against the plaintiff and all the world."

It was to meet this difficulty that the not negotiable crossing was introduced; if the cheque were crossed "Not negotiable," no person could acquire an independent title as holder in due course, and the person from whom it was stolen or obtained by fraud would remain true owner, and have his remedy under sect. 79 (2).

Apparently sect. 79 only gives the remedy to a person fulfilling the character of true owner at the time the cheque is paid contrary to the crossing. If a cheque were issued or negotiated in circumstances making it voidable but not void, and paid contrary to the crossing,

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prior to revocation, it is conceived that the person entitled to revoke could not utilise this section against the banker (see as to "true owner," p. 276, and as to "void and voidable contracts," under that heading, *post*). It might be different if the cheque were marked "Not negotiable." By the reference back of repudiation in such cases, the payment might be regarded as having been made to a person who had no title, and the person entitled to revoke as having been, in law, true owner at the date of the payment. (Cf. *Great Western Railway v. London and County Bank*, [1901] A. C. 414.)

Where a cheque has been stolen or obtained by fraud from the drawer and there is no one who has a better title as true owner, the drawer is true owner, though the terms of sect. 79 (2) seem hardly applicable. *Morison v. London County and Westminster Bank*, [1914] 2 K. B. 339. The drawer is not in a position to sustain any loss owing to the cheque having been paid contrary to the crossing, because the banker can never debit him with a cheque so paid, and so he loses nothing.

There are several grounds on which the inability of a banker to debit his customer with a crossed cheque paid in contravention of the crossing may be based.

Payment contrary to the crossing is, apart from any statutory enactment, negligence on the part of the banker, and if loss ensues, the banker cannot charge the customer. In *Bellamy v. Marjoribanks* in 1852, at which date there was no crossed cheques legislation in existence, the Court say, "If the banker disregarded the custom, and paid the cheque to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge his customer with the payment, if the person actually presenting it was not the lawful holder and bearer of the cheque" (7 Ex., at p. 404). The negligence is obviously greater at the present day in view of the statutory recognition

Banker cannot debit customer with cheque paid contrary to crossing.

and regulation of crossings. The element of loss consequent on the negligence is not specifically referred to in the above passage. If it is an essential, it seems supplied by the fact that the customer's liability for the debt, for which the cheque was given, revives if the cheque is paid to a person other than the creditor, contrary to the conditions on which it was accepted by him as discharge for the debt and to his loss. When the direct prohibition was in force, a creditor clearly only accepted a cheque in satisfaction on the condition that, if crossed, it was paid in accordance with the crossing; and it is submitted that, notwithstanding the omission of the direct prohibition, the wording and obvious intention of the crossed cheques sections, and the invariable custom of bankers not knowingly to pay cheques contrary to the crossing, are sufficient to import the condition in every case in which a cheque is taken in payment.

The more potent reason is that payment in contravention of the crossing is disobedience to the customer's mandate is an unauthorised payment with which the banker cannot debit the customer. This mandate of the customer appears independent of any direct prohibition in the Act. When the prohibition existed, no doubt it was embodied in the mandate; the customer, when crossing the cheque, in effect said to the banker, "By crossing this cheque I not only exercise my personal authority over you as my agent, but put you under statutory obligation not to pay the cheque contrary to the crossing." The direct prohibition can no longer be invoked, save in the negligible case of the cheque wrongly crossed to more than one banker. But the personal authority remains. In the face of the crossed cheques sections and the universal practice of bankers, no banker could for a moment contend that he did not understand what his customer meant by crossing the cheque, or that it meant anything but what it did during the period the direct prohibition

Disobedience
to mandate.

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remained on the Statute Book. The customer does not do it to afford the banker protection under sects. 80 or 82, but obviously for his own protection.

Deputed
mandate.

And the mandate is none the less that of the customer if the crossing be put on or added to by a subsequent holder, provided it is done under the authority of and in accordance with the Act.

When the direct prohibition existed, the holder's power to put obligation or compulsion on the paying banker, with whom he was in no manner of privity, might be based on that direct prohibition. The holder was entitled to cross, the banker was forbidden to pay contrary to the crossing, by whomsoever lawfully put on. Indeed, in the 1876 Act, the power to cross was in terms conferred only on "the lawful holder," the drawer's power being merely matter of inference. But, even while the direct prohibition existed, Courts referred the holder's power to impose restrictions and liabilities on the paying banker, not to the direct prohibition, but to a right derived from the customer, deputed by him by issuing the cheque subject to the holder's statutory power to cross, and in a condition admitting the exercise of that power. In *Smith v. Union Bank of London*, decided in 1875, when the direct prohibition was in force under 21 & 22 Vict. c. 79, the Court say, "What then is the effect of the statute in enabling the payee to cross the cheque? We think the answer is easy. It imposes caution at least on the bankers. But further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction" (1 Q. B. D., at p. 35). And again, "The drawers might refuse to be debited with it as having been paid contrary to their mandate as altered by the statute" (*ib.*, at p. 36). Here the inability to charge the customer is distinctly based on the crossing by the

holder under the power of the Act being tantamount to the actual mandate of the customer to his own agent, the banker.

In *Bobbett v. Pinkett*, 1 Ex. D. 368, the crossing was put on by the drawer himself. Bramwell, B., says, at p. 733, "The other difficulty in the defendant's way was that the cheque had across it the name of the London and County Bank, so that the defendant could only effectually present it through that bank. And if, as was the case, it was presented through another, the drawees might have refused to pay it; and, if they did pay, the plaintiff (the customer) might have refused to recognise that payment." Amphlett, B., at p. 374, says, "It cannot be denied that the crossing operated as a mandate to the drawees to pay the cheque to the bankers named, and to no one else, and that consequently the plaintiff might, if he was so minded, have declined to allow his account to be debited with the amount so paid contrary to his orders." At the date of this case (1875) the direct prohibition was in force, but the Court refer the disability of the banker to debit the customer to disobedience of that customer's orders.

It is to be noticed that in *Smith v. Union Bank, ubi sup.*, payment had been made to the true owner of the cheque. The Court state that, nevertheless, the banker could not charge the customer. The words used in *Bobbett v. Pinkett, ubi sup.*, are equally applicable to such a case. As previously suggested (p. 261), payment contrary to the crossing, even to the true owner, might possibly leave the customer still liable to the payee on the consideration; but assuming breach of the mandate, direct or delegated, as, of itself, disentitling the banker to debit his customer, the rule would apply even when the banker had paid the payee himself, although such payee, having actually received the money, could never take any steps against the drawer.

Payment to
true owner.

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There are doubtful *dicta* in *Reid v. Rigby*, [1894] 2 Q. B., pp. 43, 44, as to adoption or ratification of an unauthorised payment by accepting the benefit of it. They are inconsistent with the general law, and if applicable in any case, could not outweigh the direct authorities quoted above, in this. *Souchette v. London County and Westminster Bank*, Journal of the Institute of Bankers, vol. xli., p. 73, is no authority to the contrary. The circumstances there were exceptional. There a person authorised to draw cheques for his employer for certain purposes, drew cheques larger than necessary, forged the indorsement of the payee, and paid them into his own account with defendant bank, paying the payees the amount due to them with his own cheque on the same bank. Held, by Greer, J., that the employer could only recover the difference between the amount his payees had received and the amount of the cheques paid into the fraudulent agent's account. The same applies to *Bevan v. Capital and Counties Bank*, 23 Times L. R. 65.

The proviso to sect. 79 is difficult of interpretation owing to its involved and infelicitous language.

Proviso to
sect. 79.

It runs, " Provided that when a cheque is presented for payment, which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to, or altered otherwise than as authorised by this Act," etc.

The intention of the proviso is, presumably, to protect the banker who pays in conformity with the ostensible crossing or absence of crossing, from liability under the section to which it is the proviso.

Reference to sect. 78, and the limitation of the protection in the proviso under the words, " by reason of," etc., show beyond question that it is the crossing, not the cheque, which is really the subject of the words " have been added to or altered." As the proviso stands, the words " or to have been added to or altered " apply

primarily, if not exclusively, to the cheque rather than the crossing. CHAP. XV.

The proviso ought to run thus : “ Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to bear an addition to, or alteration of a crossing otherwise than as authorised by this Act.”

A shorter form, following the terms of the protection, would be, “ to have had a crossing which has been obliterated, or added to, or altered otherwise than as authorised by this Act ” ; but this does not grammatically include the case of a real crossing still existent, but unjustifiably added to or altered, and it would have been better if both the condition and the protection had been framed in more accurate terms.

The words in this proviso “ nor shall the payment be questioned ” are apparently designed to vindicate the banker’s right in such case to debit his customer, the previous words, “ shall not be responsible or incur any liability,” providing his protection against the true owner. They are, however, susceptible of the meaning that the drawer’s liability on the cheque and the consideration are discharged, that the true owner cannot as against drawer question the payment, having taken a security which he undertook or agreed should be treated as payment, if so dealt with ; the same position as with regard to an order cheque paid on forged indorsement. The latter seems, however, a somewhat forced construction.

It is not very clear why the language of sect. 79, both in the body and the proviso, departs from that of sect. 77 (5) in dealing with agents for collection. Sect. 77 provides that where a cheque is crossed specially the banker to whom it is crossed may again cross it specially *to another banker for collection*, the wording being altered from the previous “ *to another banker, his*

Why differs
from s. 77 (5).

CHAP. XV. *agent for collection."* Sect. 79 prohibits payment where a cheque is crossed specially to more than one banker, except where crossed *to an agent for collection being a banker*, it makes the banker liable if he pay a cheque crossed specially otherwise than to the banker to whom it is crossed *or his agent for collection being a banker*, and the same term, "*his agent for collection being a banker*," is used at the end of the proviso and in sect. 80.

The change in sect. 77 (5) must have been made with a purpose. Sect. 79, by harking back to the wording of the previous Act, seems to neutralise that purpose and require that the second banker must be the definite recognised agent for collection of the first and throw the burden of satisfying himself that such is the case on the paying banker. In most instances this would not be difficult, but there seems no reason why proximate and relative sections should be so devoid of uniformity.

Unauthorised crossing.

As the protection is limited to non-appearance, obliteration or alteration of or addition to a genuine crossing, it would not cover the case of an entire crossing put on by some person not authorised to do so by the Act; but, as shown before, this is not essential to the paying banker.

Opening a crossing.

It used to be common for a drawer to "open the crossing," as it is termed, neutralising it by writing "Pay cash," and initialling, and the practice received a certain amount of sanction from *Smith v. Union Bank* (see at 1 Q. B. D., p. 35).

But a banker acting on such opening would be liable to a true owner who had taken the cheque crossed, or had himself crossed it or added to the existing crossing, and who suffered loss by reason of the cheque being paid contrary to its then condition. When the drawer has once parted with the cheque, he cannot retract or neutralise his mandate, to the prejudice of anyone who has taken the cheque on the faith of it, if and so

far as then exercised, or has himself acted by virtue of the delegation of that mandate so far as then unexercised by the drawer or a previous holder. The suggested avoidance of the crossing in *Smith v. Union Bank, ubi sup.*, is only contemplated as the result of joint action by the drawer and lawful holder.

Presumably the banker paying across the counter a cheque on which the crossing had been opened by his customer would be entitled to indemnity from the latter. But if, as has happened, a fraudulent person writes "Pay cash" and forges the drawer's initials, the banker is not protected or entitled to charge his customer if he pays the cheque over the counter. The crossing has not been obliterated, added to or altered within the meaning of the proviso to sect. 79, where "altered" clearly refers only to the substitution of one banker's name for that of another. On November 7, 1912, the Committee of London Clearing Bankers passed a resolution in the following terms: "That no opening of cheques be recognised unless the full signature of the drawer be appended to the alteration, and then only when presented for payment by the drawer or his known agent." The general practice of London banks is now in accordance with this regulation.

Banker
paying such
cheque.

These words in the proviso to sect. 79, "to have been added to or altered otherwise than in accordance with the Act," are adopted from sect. 78. They must be taken to refer only to what would be effective additions or alterations if carried out under the authority of the Act. They would not include an addition which was merely in substance a memorandum, though locally incorporated with the regular crossing. "Account payee," "account A. B.," whatever their other effect, are not unlawful additions within this section. (*Akrockerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B., at p. 472.)

Addition or
alteration.

Sect. 80 is in the main a declaratory section so far as Sect. 80.

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concerns the banker. It provides that where the banker on whom a crossed cheque is drawn pays it, in good faith and without negligence, in accordance with the crossing, he shall be entitled to the same rights, and be placed in the same position as if payment of the cheque had been made to the true owner thereof. It is little more than a reversed statement of the effect of sect. 79.

The introduction of the words, "in good faith and without negligence," precludes the utilisation of sect. 80 for general protection where specific protection under other sections fails. If, for instance, a banker paid a crossed cheque in accordance with the crossing, but in some other respect not in the ordinary course of business, so as to lose the protection of sect. 60, the same fact would be held negligence, disentitling him to the benefit of sect. 80.

Nor can this sect. 80 be stretched to cover every case in which a banker pays what purports to be a crossed cheque in accordance with its ostensible crossing. It would not entitle a banker to debit his customer with a cheque to which that customer's signature as drawer was forged, although such document purported to be crossed. It might not be negligence in the banker not to detect the forgery if skilfully done, and the payment would be in good faith, but the document would not be a cheque drawn on him (see *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49), and so would not come within these provisions. On the same principle, it would not entitle a banker to debit his customer with more than the original amount of a cheque which had been fraudulently raised, unless the customer had been guilty of negligence in the drawing thereof.

So, again, if it be held that a cheque cannot be a crossed cheque unless the crossing be put on by someone authorised under the Act, this section would not protect the paying banker in the case of an ostensibly crossed cheque, on which the crossing had been put by an

unauthorised person. But the banker, if paying in the usual course of business, would be protected either by sect. 60 or as having duly paid a bearer cheque. The only way in which he could possibly be affected would be on the extreme doctrine enunciated in *Simmons v. Taylor*, 2 C. B. N. S. 539; 4 C. B. N. S. 467, that material alteration renders the cheque no longer the cheque of the customer. That doctrine must, however, probably be confined to cases where the alteration absolutely blots out the customer's mandate, which is not so here.

With respect to cheques crossed "account payee," or "account A. B.," some little consideration is necessary. "Account payee."

It may be assumed, as before stated, that neither the transferability nor the negotiability of the cheque is limited by the addition of any such words to the crossing.

It may further be assumed that disregard on the part of the paying banker of any intimation conveyed by the words can give no direct remedy against him to the true owner, under sect. 79. The cases in which such remedy accrues are limited by that section, and include no reference to this unauthorised addition. There is no general term, such as "in accordance with the crossing," in the section.

It may further be assumed that the drawer's mandate to his banker cannot be affected by the addition of such words as "account payee" or "account A. B." by any holder.

The implied delegation of the drawer's authority, with respect to crossings, derived from the statute, extends only to crossings contemplated and authorised by the statute.

It is obviously impossible for the paying banker to see to the disposition of the proceeds in the hands of the collecting banker, and he fully discharges his duty when he pays in accordance with the crossing, apart from the unauthorised addition.

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"Account
payee" and
subsequent
indorsements.

The only case which raises any question is that of an order cheque, crossed "account payee," and bearing, when presented, indorsements subsequent to that of the payee, showing that it has been negotiated by him, and raising the inference that the proceeds will not go into his account. If it be assumed that the words "account payee" were put on by the drawer, it might be contended that they formed part of his mandate to the banker; equivalent to his saying: "You are not to pay this cheque if, when it reaches you, it shows signs of having passed out of the possession of the payee."

But, as against this, there is the argument that the banker has no means whatever of knowing whether the words were put on by the drawer, by the payee himself, or by some other person, and further that the drawer, even if he himself put them on, has nevertheless issued an instrument negotiable *ad infinitum* by indorsement, with nothing which in law tends to limit that negotiability. So far, therefore, as disregard of the mandate is concerned, it would seem that the banker incurs no liability; the mandate, in any case, being contradictory and ambiguous, and the banker therefore entitled to act upon a reasonable construction of it. The only way the question could arise would be if one of the indorsements were forged. The true owner might then contend that the paying banker was not protected by sect. 60, as not having paid the cheque "in good faith and in the ordinary course of business," nor by sect. 80, as not having paid it "without negligence"; and the drawer might object to be debited on the same grounds.

The true owner is entitled to take advantage of the "without negligence" exception, the duty to him being statutory, and a counter-balance to the protection afforded the banker by sect. 80.

In *House Property Co. of London v. London County and Westminster Bank*, The Times, June 9, 1915, Rowlatt,

J., held that a crossed bearer cheque with a named payee and marked "account payee," was not collected without negligence under sect. 82 if collected for another account, but such a cheque would obviously bear no indorsement, and therefore this does not touch the paying banker. Should the matter ever come up for decision, a Court would, in all probability, not be disposed to give much effect to an unauthorised addition of this sort, as against the paying banker; they would probably take the line that it constituted only a memorandum addressed to the collecting banker, its sole hitherto recognised function, and, if properly fortified by the evidence of bankers, would hold that the payment was not out of the ordinary course of business, and that the banker was therefore protected, both against his customer and the true owner, by sect. 60, or by sect. 80, inasmuch as no negligence was attributable to him. (Cf. *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465.)

The question is the less likely to arise in future owing to the now well-nigh general practice of bankers not to collect crossed cheques marked "account payee" for any account other than that of the payee.

A cheque bearing the words "not negotiable" without one of the regular crossings is not a crossed cheque. The paying banker, therefore, cannot insist on its being presented through a banker, and incurs no liability under sect. 79 by paying it over the counter. If such a cheque bear evidence of having been negotiated, he may either pay it or refuse payment. In the first case, he would justify his action on the ground that the words had no significance in face of "order" or "bearer," and that he could not tell by whom they were put on; in the second, on the ground that the cheque was contradictory, embarrassing, and irregular.

Not negotiable.

The extension of the crossed cheques sections, by sect. 17 of the Revenue Act, 1883, to documents issued by

Revenue Act, 1883, s. 17.

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a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, raises an analogous point. The same section provides that it shall not be deemed to render any such document a negotiable instrument. As previously pointed out, this clearly means that such documents are not legally transferable, and the paying banker must be taken to know this.

If, therefore, he pays one of them which bears evidence of having been transferred, such as indorsement other than that of the payee by way of receipt or for collection, the banker might, although paying in accordance with the crossing, lose the protection of sect. 80, on the ground of negligence.

Dealing between two customers.

When a crossed cheque paid by one customer is paid in by another, the position is as follows. Either the bank is protected as having paid it to a banker, under sect. 80, or sect. 79 does not apply to such a case, and therefore the banker is protected, in case of forged indorsement of an order cheque, under sect. 60, in case of a bearer cheque, as having legally and properly paid it. (*Gordon v. London City and Midland Bank*, in the Court of Appeal, [1902] 1 K. B. 242.)

It has been suggested that this would not apply in all cases, for instance, if negligence were found against the bank in the collection of the cheque. It is pointed out that the jury negatived negligence in this connection in the *Gordon Case*. It is argued that a bank is one entity, and that it cannot escape liability incurred in one capacity by setting up what might be a complete defence to an independent party. The question is a difficult one, and may be left for decision if and when it arises. If there is anything in it, it would apply equally to the case of a cheque paid in at one branch and paid at head office or another branch.

CHAPTER XVI

CONVERSION—MONEY HAD AND RECEIVED.
VOID AND VOIDABLE INSTRUMENTS

A CONVERSION is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it. (Bullen & Leake, 5th ed., p. 382.)

Conversion defined.

Intention is no element in conversion. "Any person who, however innocently, obtains possession of goods the property of another who has been fraudulently deprived of the possession of them, and disposes of them, whether for his own benefit or that of another person, is guilty of a conversion." (Bullen & Leake, *ubi sup.* *Hollins v. Fowler*, L. R. 7 H. of L., at p. 795 ; *Clayton v. Le Roy*, [1911] 2 K. B. 1031 ; *Morison v. London County and Westminster Bank*, [1914] 3 K.B. 356.)

In *Edelstein v. Schuler*, [1902] 2 K. B. 144, Bigham, J., held that a broker who sold securities for a thief was not liable in conversion, mainly on the ground that as the securities were negotiable, the purchaser would acquire a good title. The authority seems a doubtful one.

A bill, note, or cheque, or the paper it is written on, is "goods" within the above definition. Where it is a negotiable instrument, the damages are its face value. (*Morison v. London County and Westminster Bank*, *ubi sup.*) Even in the case of a non-negotiable instrument, it would seem that the person who has obtained money

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When action maintainable.

It is to this action that, subject to statutory protection, a banker is liable who—

- (a) Pays a cheque on a forged indorsement. (*Smith v. Union Bank of London*, L. R. 10 Q. B. 293, 295; 1 Q. B. D., at p. 35.)
- (b) Collects a bill, note, or cheque with a forged indorsement, or to which the customer has no title. (*Bissell v. Fox*, 53 L. T., N. S. 193; *Fine Art Society v. Union Bank of London*, 17 Q. B. D. 705; *Kleinwort v. Comptoir National d'Escompte*, [1894] 2 Q. B. 157; *Great Western Railway Co. v. London and County Bank*, [1899] 2 Q. B. 172; [1901] A. C. 414; *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.)
- (c) Pays a bill accepted payable at his bank to a person who holds it under a forged indorsement. In this case there is, of course, no statutory protection, even if the bill were one payable on demand, inasmuch as it is not drawn on the banker.
- (d) Delivers goods entrusted to him for safe custody to the wrong person. (See "Valuables for Safe Custody.")
- (e) Takes as holder for value a bill or cheque with a forged indorsement; or a cheque marked "Not negotiable," to which the title is void or defective. (*Great Western Railway Co. v. London and County Bank*, [1901] A. C. 414; *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.)

In all cases involving payment of money, the liability for conversion is quite independent of any question of

the right to debit the customer. The banker may be liable in conversion, and disentitled to debit his customer at the same time, and so stand to lose the money twice.

The person to whom this remedy is given, or against whom the banker is protected, is frequently termed in the Bills of Exchange Act "the true owner," but no definition is given in the Act. The term also constantly occurs in judgments, but again without definition. The matter is complicated by this: where a cheque or bill has been wrongfully taken or detained from a man, or dealt with in a manner inconsistent with his rights, and prejudicial to him, his only remedy is, clumsily enough, by an action for conversion, trover, or detinue of the paper on which the cheque or bill is written. (See *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, *per* Reading, L.C.J.) There is no other form of action available but this, and this form of action is confined to dealings with chattels. But the chattel part of a negotiable instrument, while it brings it within the range of conversion, is the subordinate element of its entity. The contractual part, of which the chattel is merely evidence, involving as it does negotiability, governs the passing of the property in and right of possession to the piece of paper, and may divert or suspend both of them to quarters or in ways which would be impossible in the case of anything which was a mere chattel without any contractual element, such as a horse or a book. In *Smith v. Union Bank of London*, 1 Q. B. D. 31, a cheque become payable to bearer was stolen and negotiated to a holder in due course. It was held that he, and not the person from whom it was stolen, was the "true owner." So, on the other hand, a forged indorsement or the "Not negotiable" crossing may preclude the passing of the property in the paper in circumstances otherwise sufficient to transfer it. If a cheque is wrongfully issued by an agent authorised to draw it for specific

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Who may
sue for
conversion.
The true
owner.

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purposes, the principal remains the owner. (*Morison v. London County and Westminster Bank*, [1914] 3 K. B. 364, 375.)

Possibly the addition of the otherwise superfluous word "true" in the descriptive title "true owner," is designed to point this. For the "true owner," in the sense of the person who can support conversion for a bill, note, or cheque, is the person who, taking into consideration the provisions of the Bills of Exchange Act, and recognising that the negotiable character of the instrument overrides the mere property in the chattel, is on that basis entitled to the property in and possession of the piece of paper.

Principal
and agent.

A difficulty arises in the case of a bill or cheque made payable to an agent in his own name or under his official designation, but for monies due to and intended to be received by his principal. Take the case of a cheque sent for rates or Inland Revenue duties to the rate or tax collector, and made payable to him personally either by name or description. Who is the true owner of such cheque, the agent or his principal? The principal would contend that a subordinate, who has no real interest in the cheque and only receives and holds it as a servant or agent, to be dealt with or applied for his superior's use and benefit, cannot fitly be described as an owner, still less a true owner. *Great Western Railway v. London and County Bank*, [1901] A. C. 414, affords some support for this contention. There a cheque was made payable to Huggins or order, he being a rate collector, in payment of rates falsely represented by him to be due from the Great Western Railway. Lord Halsbury, L.C., said, at p. 418, "In this case it cannot be pretended that Huggins had any title to it at all." Lord Davey says (p. 419), "I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers

Argument for
principal.

in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers, the overseers, notwithstanding that it was made payable to Huggins' order. Huggins therefore had no real title to the cheque." That case, however, is very far from conclusive. The plaintiffs, the appellants, were the Railway Company, the drawers of the cheque, not the overseers for whose benefit it was intended. Inasmuch as there was really nothing due to the latter, the case was exceptional as regarded them, and they might well not be true owners. The decision only goes to the fact that, in the particular circumstances, the drawers remained true owners. The argument on the other side would be that interest in the bill is no necessary attribute of the holder, as in the case of an indorsee for collection ; that the payee of a bill or cheque is the holder (sect. 2) and may even be the holder in due course (*Lloyds Bank v. Cooke, per Moulton, L.J., [1907] 1 K. B. 794 ; Smith v. Prosser, [1907] 2 K. B. 735*), that a cheque may be payable to the holder of an office for the time being (sect. 7 (2)), and that if the cheque be to order no one could become holder or entitled to it without the indorsement of the payee ; if to bearer, without delivery. Where the cheque was made payable to a man under his official denomination and for a debt really due to his superiors, a court would probably hold that such superiors were true owners, and that anyone dealing with such a cheque had notice of their rights. If such a cheque were for Government purposes, the exceptional rights of the Crown might afford further ground for making the banker or other person who had received the money refund it. (See *In re West London Commercial Bank*, 38 Ch. D. 364.) If the cheque was payable to such agent in his private capacity, the superiors might still be true owners,

Argument
against.

Probable
result.

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but there would be nothing on the face of the cheque negating the agent's personal title; with a banker collecting it crossed, it would be a question of negligence; with a transferee, of *bona fides*, unless crossed "not negotiable."

After acquired title.

It is generally laid down in stating the position requisite for a plaintiff in conversion, that he must be entitled to the property in and possession of the chattel at the date of the conversion. (See *White v. Teal*, 12 A. & E., at p. 115.)

It has been said that a man cannot sue for conversion by virtue of a subsequently acquired title to the chattel converted. In *Bristol and West of England Bank v. Midland Railway Co.*, [1891] 2 Q. B. 653, the question was dealt with by the Court of Appeal, and the previous authorities reviewed. The Court held that when the rightful owner demanded the goods, refusal, of itself, constituted a conversion; that it was no answer to the demand to say that the goods had been parted with prior to the accrual of that owner's title, if the parting with them was a wrongful act against the person to whose title the plaintiff had subsequently succeeded. (Cf. *London Joint Stock Bank v. British Amsterdam Maritime Agency*, 104 L. T. 143; 16 Com. Cases, 102.)

But the case must be distinguished from those where the goods have in the interim been parted with, not wrongfully, but rightfully, as by delivery by a person having a revocable title, before revocation or notice thereof, or have been dealt with on his behalf during the same period. It is abundantly clear that no conversion will lie for such acts either at the suit of the original owner or anyone deriving title from him.

And this latter principle will probably be found to exclude the former one in all cases connected with bills, notes, and cheques, by reason of their negotiable character and the governing element of contract involved in them.

If a bill, note, or cheque is delivered as a contract, the property in the chattel passes, it may be only temporarily, if the contract is revocable; if there is no contract, the property never passes. Whether there is a contract or not depends on the existence or absence of a contracting mind. Where there is a contract, then the result of that contract and its negotiable incidents is, that third persons may acquire rights which subsequent revocation will not be permitted to prejudice or affect.

The distinction is almost invariably brought forward by and in cases of fraud.

A man is induced by false representations as to the nature of the document, or by the substitution of one document for another, to put his hand to what is in form a negotiable instrument. There is no contracting mind, the document is null and void; and the property in, and right to possession of, the chattel, the piece of paper, remain absolutely vested in the person deceived. (*Foster v. Mackinnon*, L. R. 4 C. P. 704; *Lewis v. Clay*, 67 L. J. Q. B. 214.) As Buckley, L.J., said in *Carlisle and Cumberland Bank v. Bragg*, [1911] 1 K. B. 489, "The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that what preceded his signature should be taken as his act and deed. If he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case, it is not his deed." Warrington, L.J., said, "It seems to me essential that the contract which the signer means to execute should be of a nature entirely different from the contract in dispute."

It has been sought to import the element of negligence as estoppel in this connection. (*Carlisle and Cumberland Bank v. Bragg*, *ubi sup.*) This might hold good as between customer and banker, where the fraud resulted in the drawing of a cheque. In no other case can there be a duty to anyone, consequently no negligence.

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When the property in a bill passes.

Void and voidable contracts.

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A man is fraudulently deceived into issuing a negotiable instrument in favour of one specific person in the belief that he is another specific person: an essential element of contract is lacking, and the results are the same. (*Lindsay v. Cundy*, 3 A. C. 459; *Tate v. Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376.)

A man is induced by fraud to execute and issue a negotiable instrument, knowing its character, and there being no substitution of one specific person for another. The contract is not void, but voidable. The property and right of possession in and to the chattel are divested; but, on repudiation of the contract, revert to the defrauded person, subject to any right acquired by third parties in the interval. (*Clutton v. Attenborough*, [1897] A. C. 90; *Tate v. Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376; cf. *Cahn v. Pockett's Bristol, &c., Co.*, [1899] 1 Q. B. 643; *Whitehaven v. Davison*, [1911] 1 K. B. 479.)

The distinction is, as suggested by Lord Penzance in *Lindsay v. Cundy*, 3 A. C., at p. 461, between a man who, being deceived, enters into no contract, and a man who, being also deceived, does enter into a contract. The doctrine of this case was held distinctly applicable to negotiable instruments by Lord Davey, in *Great Western Railway Co. v. London and County Bank*, [1901] A. C. 414, and by the Court in *Tate v. Wilts and Dorset Bank*, *ubi sup.*

Rights of
third parties.

The rights of third parties which hold good against subsequent repudiation of a voidable contract, and preclude the action of conversion, are of various kinds and degrees.

Of course, a holder in due course of a bill, cheque, or note, which he has taken in the interval, is fully protected. (*Clutton v. Attenborough*, [1897] A. C. 90.)

But a smaller right in the instrument than that of

a holder in due course would seem to be sufficient. In *Tate v. Wilts and Dorset Bank*, Journal of the Institute of Bankers, vol. xx., p. 376, Channell, J., says: "I take it the bankers were the holders of the cheque (whether they were holders for value does not matter), and that they got payment of it in the regular way. It is admitted, if that was so, there was a fresh disposition of the cheque, and that thereupon the transaction could not be avoided so as to make the bank liable." CHAP. XVI.

"Fresh disposition" is a very wide term, and would cover almost any legitimate dealing with a negotiable instrument. As exemplified in this case of *Tate v. Wilts and Dorset Bank*, the doctrine protects the banker who has collected an uncrossed cheque for a customer, where that customer holds it under a voidable title. Fresh disposition.

But no rights countervailing repudiation of a voidable contract can be acquired through a cheque marked "Not negotiable," except where statute affords protection. Voidable contracts and the "Not negotiable" crossing.

The effect of such marking is to put each holder on precisely the same footing. On repudiation or revocation of a voidable contract affecting such cheque, the title of the true owner relates back to the date of the fraud or other circumstance which entitles him to repudiate. Every person who has taken or dealt with the cheque does so on the basis that his position is subject to possible revocation, and can therefore set up no rights acquired during the interval, either to the cheque or its proceeds. (*Great Western Ry. Co. v. London and County Bank*, [1901] A. C. 414; *Morison v. London County and Westminster Bank*, [1914] 3 K. B., at p. 375.) Any one of the successive holders could be sued for conversion, it being no defence that he has parted with the article converted. The document stands on a lower level than an ordinary chattel, to which an innocent third party can acquire a good title by purchase from one who holds it under a voidable contract. (*White v. Garden*, 10 C. B. 919.)

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And, in questions of conversion, the liability of an agent being dependent on the title of his principal, it would follow that any person dealing with the cheque, as a banker in collecting it, would on revocation be liable in conversion to the true owner, unless protected by sect. 82 of the Bills of Exchange Act.

Money had
and received.

Wherever conversion lies, and money has been received for the goods or negotiable instrument converted, the true owner is entitled to waive the wrong and sue for money had and received to his use. The claims are usually joined in the alternative, and this is the form in which the action is couched against, for instance, a banker who has collected a cheque with a forged indorsement.

Not merely
alternative.

This form of pleading has always been treated as really alternative in effect, the joinder of a claim for money had and received not operating as a waiver of the wrong so as in any way to prejudice the claim in conversion, but leaving the plaintiff free to recover on either ground, and defences appropriate to each being open to the defendant. (See, for instance, *Morison v. London County and Westminster Bank*, *ubi sup.*) The action for money had and received is, of course, not merely an alternative to conversion, or dependent on the existence of a conversion; it is an independent and widespread form of action, and lies in many cases where conversion would not. The *dictum* of the Privy Council in *John v. Dodwell*, [1918] A. C., at p. 570, "The action for money had and received is, according to the law of England, in its nature one of assumpsit, founded on implied or imputed contract and depends on a waiver of any tort committed, and on the correlative affirmance of a contractual relation," if and in so far as it avers dependence on the existence and waiver of a tort, is clearly incorrect.

It is, at the present day, the most difficult of all actions to define or dogmatise about.

In *Sinclair v. Brougham*, [1914] A. C., at p. 453, Lord Sumner said it was hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, and the remark is equally true of other aspects of the question. The outcome of the whole matter, as deducible from the judgments in *Sinclair v. Brougham*, would seem to be, as indicated in the *dictum* of Lord Sumner, above quoted, that the action lies where, from the circumstances, the law will imply or impute a promise to repay by the defendant. It may be a mere fiction of law which supplies the promise, and it cannot be implied where, as in *Sinclair v. Brougham*, it would, if actually made, be *ultra vires*. As to when the promise will be implied is, as Lord Sumner says, hard to formulate. The old idea was that the action was an importation of principles of equity into common law, and that the money was recoverable where it was unconscientious, "*contra æquum et bonum*," for defendant to retain it as against the plaintiff. Lord Sumner says, at p. 456, "There is now no ground left for suggesting as a recognisable 'equity' the right to receive money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer." Another doctrine was that the action was founded on a quasi contract growing out of the principle of unjust enrichment; that a man could not retain a mere windfall at the expense of another. (See *Sinclair v. Brougham*, at p. 417.) *Sinclair v. Brougham* is not so conclusive as it might have been but for the existence of the *ultra vires* element excluding promise implied or fictitious, but the practical outcome seems to be that, apart from waiver of an existing tort, the range of money had and received will be found to be pretty well limited to money paid by mistake. Lord Dunedin goes near saying this, at p. 433. But, as illustrated by *Sinclair v. Brougham* and *John v. Dodwell*, it seems very

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probable that in many cases where, under the old system, money had and received would have been the remedy, the same result can be obtained by the utilisation of the "tracing order."

As to money paid by mistake, see under that heading.

Position of
an agent.

The position of an agent with regard to money had and received for his principal calls for some notice.

If his agency has involved him in a conversion he is liable for the conversion; the plaintiff can rely on that and need not resort to any claim for money had and received. (*Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, the case of a banker collecting a crossed cheque to which customer had no title.)

Where an agent has not been concerned in conversion, and is sued for money had and received, the whole series of cases bearing on the subject are summarised in *Kleinwort Sons & Co. v. Dunlop Rubber Co.*, in the House of Lords, 23 Times L. R. 696. Lord Atkinson, after reviewing many of them, says: "Whatever may in fact be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he will be liable to refund if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he paid over the money he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position, that it would be inequitable to require him to refund." The only exception or qualification on this rule so far as regards a principal would seem to be where payment has been made to him on a negotiable instrument, and such an interval has elapsed that his position has or may have been altered, on the principle of *Cocks v. Masterman*, 9 B. & C. 902; *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7. In

The Morison
case.

the *Morison Case*, Buckley, L.J., [1914] 3 K. B., at p. 378, extends this principle to the case of the collecting banker, a novel and valuable concession. He says: "The principle of *Cocks v. Masterman* and of *London and River Plate Bank v. Bank of Liverpool* is, I think, applicable. The principle is larger than that in *Holland v. Russell*. It is, I think, the case that the bank are not here to be treated simply as agents who paid money to Abbott as their principal before the bank received notice not to pay it. The money here has been received by the defendants in good faith and paid to their customer, Abbott, in good faith. Since its receipt they have altogether altered their position in that they have in good faith paid the money away to Abbott. Under these circumstances, I think the principle of *Cocks v. Masterman* applies and that the defendants cannot be rendered liable for it to Morison."

Lord Reading, at p. 373, after saying that the plaintiff was entitled to maintain his action for damages for conversion of the cheques and was not driven to rely upon the alternative count for money had and received to his use, said it was therefore unnecessary to deal with the points raised by the defendant bank in answer to the alternative claim, and added, "They would, in my judgment, in themselves form no answer to the alternative claim. I content myself with expressing my view that the principle in *London and River Plate Bank v. Bank of Liverpool* and not that in *Holland v. Russell* governs this case." It is submitted there must be some error here, inasmuch as, as stated by Buckley, L.J., the principle of the *London and River Plate Bank Case* would afford an answer to money had and received. This seems confirmed by what was said by Phillimore, L.J., at p. 382. In rebutting an argument on behalf of the plaintiff, he said: "If it were otherwise, there would be two objections to the point as a point in favour of the plaintiff: one is

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that the only person who could avail himself of the right to recover would be the man who discharged the instrument, that is, the plaintiff's bank, not the plaintiff; the other that if the plaintiff's bank sought to do it, the special rule as to prompt recovery of money wrongly paid to discharge a negotiable instrument laid down in such cases as *London and River Plate Bank v. Bank of Liverpool* and *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, would apply."

The Law Journal report of Lord Reading's judgment on this point is in the same words as the Law Reports; The Times Law Reports, 30 Times L. R., at p. 485, omits the reference to the alternative claim and runs, "His Lordship, continuing, said that the principle in *River Plate Bank v. Bank of Liverpool* and not that in *Holland v. Russell* covered the case." It is unfortunate there should be any doubt on the point, but it may fairly be assumed that the Lord Chief Justice said or meant to say the same as the Lords Justices. As to payment on negotiable instruments see "Money paid by Mistake."

As exemplified in the *Morison Case*, however, the money had and received claim is superfluous where conversion lies.

In fitting circumstances the distinction between a void and voidable contract affecting a cheque or bill might influence the position of the agent. There being no conversion by the dealing with a voidable instrument pending repudiation, the true owner can only recover money received upon it by the agent and parted with during the interval, if the position of the agent from whom he claims would not be prejudiced by his having to repay.

On this principle, a banker is protected if he has collected a cheque or bill for one who has a voidable title to it, and has paid the money over, without the means of recovering it, before he has received notice

of revocation. (See *Bavins, jun., and Sims v. London and South-Western Bank*, [1900] 1 Q. B. 270. In this case the fact that the bank had credited the customer's account with the proceeds of the cheque, and that amounts had been drawn out which, on the ordinary system of appropriation, exhausted those proceeds, was held not to preclude the true owner from recovering as money had and received, inasmuch as the state of the account was such as admitted of the bank debiting the amount to the customer, and therefore the bank were not, in fact, prejudiced, and had not irrevocably altered their position. Presumably the same rule would obtain, even in cases within *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, inasmuch as the right of a banker to debit the customer with a returned cheque, or money credited thereon seems, in that case, to have been held consistent with the banker's having been holder for value of the cheque.

In some cases it seems to have been suggested that negligence might deprive the agent of the protection above referred to ; but it will be noticed that in *Bavins, jun., and Sims v. London and South-Western Bank*, the Court of Appeal found that the bank had acted negligently, and yet were prepared to extend to them the protection, had the facts warranted or necessitated it.

Question of
negligence.

CHAPTER XVII

THE COLLECTING BANKER

Capital and
Counties Bank
v. Gordon.

THE legal conception of the collecting banker enunciated in *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, hereafter referred to as the *Gordon Case*, was that of a mere conduit pipe, receiving the cheque from the customer, presenting it and receiving the money for the customer, and then, and not till then, placing it to the customer's credit, exercising functions strictly analogous to those of a clerk of the customer sent to a bank to cash an open cheque for his employer (see at p. 246). The crediting a cheque as cash in the banker's own books before actual receipt of the money was held a departure from and inconsistent with collection pure and simple, and further as fixing the banker with having taken the cheque as transferee, holder for value, or what would have been such capacity but for the intervention of forged indorsement ; involving the result that the banker subsequently received the money for himself and not for the customer, and was, in the case of crossed cheques, precluded from claiming the protection of sect. 82.

With uncrossed cheques, the judgment of the House of Lords has little to do. A banker who simply collects an uncrossed cheque for a customer has no protection whatever. He is purely dependent on his customer's title. If there is forged indorsement or a defective title in the customer the banker is liable to the true owner for conversion or money had and received. He can only look to his customer for indemnity.

If the banker is not simply collecting, if he takes the uncrossed cheque as holder for value, he occupies exactly the same position as any other person who so acquires the cheque. If there is forged indorsement he is liable to the true owner and acquires rights only against indorsers, if any, subsequent to the forgery. If there is no question of forged indorsement, but only defective title or no title in the customer, then the banker is holder in due course with good independent title against everybody, entitled to hold, and sue all prior parties on, the cheque. On this point the *Gordon Case* only confirmed what had already been decided in *ex parte Richdale*, 19 Ch. D. 409, and *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, viz. that crediting as cash constituted the banker a holder for value, entitled as such to the right to retain and sue for the full value of the cheque. (Cf. *Sutters v. Briggs*, [1922] A. C. 1.)

Nor is there anything in the *Gordon Case* to prevent a banker asserting precisely the same rights with regard to crossed cheques taken by him as holder for value, by crediting as cash or otherwise. So far as that case goes, if there is no question of forged indorsement, and the cheque is not crossed "Not negotiable," the banker can claim all the rights of a holder in due course. The question of the bearing of the Amendment Act of 1906 and the *dictum* of Astbury, J., in *Re Farrow's Bank*, Times, July 20, 1922, will be dealt with later.

What the *Gordon Case* really did was to deprive bankers of protection against the true owner with regard to crossed cheques with forged indorsement, or marked "Not negotiable," to which the customer had no title or a defective title, where such cheques had been credited as cash before receipt of the money. The protection so denied was, of course, claimed under sect. 82.

It being the practice of very many banks so to deal

CHAP. XVII. with cheques, crossed as well as open, the decision created a good deal of uncertainty and business complication.

Well-meant but not very convincing efforts were made by the courts to minimise its effect (cf. *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465; *Bevan v. National Bank*, 23 T. L. R. 65); various devices were adopted by some banks, such as suspense accounts or crediting cheques as "sundries" instead of "cash," a camouflage which the author has good authority for believing was effective in law, and which is still maintained by some banks notwithstanding the passing of the Act of 1906. Government brought in amending Bills in 1903, 1904, and 1905, which were successively dropped; and finally in 1906 obtained the passing of the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17). The operative part of this Act is contained in sect. 1, and enacts: "A banker receives payment of a crossed cheque for a customer within the meaning of sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

Amendment
Act, 1906.

Save for neutralising the effect of the *Gordon Case* by enacting that mere crediting as cash shall not deprive the banker of protection under sect. 82, this Act imports no alteration in that section, and protection is still dependent on its conditions being fulfilled by the banker.

Sect. 82 of the Bills of Exchange Act, 1882, is as follows:—

Bills of Ex-
change Act,
s. 82.

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Unless the banker can bring himself within the

conditions formulated by this section, he is left with his common law liability for conversion or money had and received, in the event of the person from whom he takes the cheque having no title or a defective title thereto. CHAP. XVII.

One modification, and one only, must be engrafted on the section. If the receipt of the money is protected by the section, the protection covers all prior dealings with the cheque. True, the section specifically deals only with the receipt of the money, and it has been contended, and even held, that the taking of the cheque from a person who had no right to it, or some formal, preliminary act, such as the banker stamping his name across it, was an independent conversion, against which the banker was not protected, though he ultimately brought himself strictly within the section by receiving payment only for the customer. The ineptitude of the wording must be supplemented by a common-sense reading in order to avoid a patent absurdity. As Lord Macnaghten says in the *Gordon Case*, *ubi sup.*, at p. 244: "The only question is, did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part, taken in view and anticipation of receiving payment. The section would be nugatory, it would be worse than nugatory, it would be a mere trap, if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result." The same has been held in subsequent cases which, in view of this authoritative pronouncement, it seems unnecessary to cite. It was fully recognised in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356.

But with this modification every clause of the section

Modification
of section.

CHAP. XVII. must be fulfilled in order to entitle the banker to the protection it confers.

Clause 1.—“ In good faith and without negligence ”

The protected case is where “ a banker in good faith and without negligence receives payment.”

If it were only the receipt of payment which had to be in good faith and without negligence, the section, from the true owner's point of view, would be “ nugatory, worse than nugatory, and a mere trap.” The obligation and the protection must be co-relative and co-extensive. If the words “ receives payment ” are to be read as involving protection to the banker for all preliminary operations leading up to the receipt of the money, the condition precedent to that protection, viz. that the banker shall act in good faith and without negligence, must cover the same ground.

Moreover, the ordinary mind fails to visualize a condition of things in which a banker could take a crossed cheque negligently or in bad faith, present it negligently or in bad faith, and yet receive the money from his customer in good faith and without negligence.

One must not therefore read the *dictum* of the Privy Council in *Commissioners of Taxation v. English, Scottish and Australian Bank*, [1920] A. C. 683, as seriously impugning this obvious proposition. At p. 688, their Lordships, after pointing out that the words of the section are “ without negligence receives payment,” say : “ It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque.” As will be seen hereafter, the opening of an account without inquiries has been treated in the High Court as sufficient of itself to fix a bank with negligence under sect. 82.

If the *dictum* of the Privy Council is only directed to this one point, it may be left as a matter of dissentient opinion; if it implies that the *punctum temporis* where negligence becomes material is that of the receipt of the money, one can only respectfully differ.

The whole transaction, then, from the taking of the cheque to the receipt and disposition of the money, must be in good faith and without negligence.

The question of good faith does not require consideration. Its existence on the part of the banker is presumed throughout these pages.

What constitutes Negligence

The transaction must be without negligence. The question of what constitutes legal negligence in matters of this sort is one on which lawyers and bankers are seldom agreed.

The banker maintains that the exigencies and pressure of business make it physically impossible to adopt all the precautionary measures which the law would seek to impose upon him.

The attitude of the law is that typified by Lord Bramwell, who used to say that he was constantly told that banking could not go on if particular conditions and obligations were imposed on bankers, but that he invariably found that banking did nevertheless go on and flourish.

Where a jury have to deal with the question, the natural tendency of each jurymen is to view the matter as if he were himself the plaintiff, and it was his own money that was at stake. So that in any case the banker must be prepared to find the standard of care required of him put somewhat higher than he might consider reasonable.

It should be noticed that the importation of negligence at all into this section is, in a sense, an anomaly.

Negligence
in this section
is artificial.

CHAP. XVII. There can be no negligence without a duty. (*Scholfield v. Londesborough*, [1896] A. C. 514 ; *Carlisle and Cumberland Bank v. Bragg*, [1911] 1 K. B. 489.) There is no contractual relation between the collecting banker and the true owner, giving rise to a duty on the part of the former to the latter. The banker's only contractual obligation is to his own customer ; and conduct beneficial to the customer at the expense of the true owner is no breach of that duty.

The true exposition of the matter is that given by Denman, J., and the Court of Appeal in *Bissell v. Fox*, 51 L. T. N. S. 663 ; 53 L. T. N. S. 193. The duty is a purely statutory one imposed on the banker in favour of the true owner, and the negligence consists in the disregard of his interests, apart from those of the customer.

Is breach of implied duty to true owner?

The assumption of this duty and liability to a stranger must be regarded as part of the price paid by bankers for protection under section 82.

It is from the standpoint, then, of the true owner that all questions of negligence under this section must be viewed.

It would be futile to try and formulate particular conditions of circumstances which might or might not establish negligence in this connection. Broadly speaking, the banker must exercise the same care and forethought in the interest of the true owner, with regard to cheques paid in by the customer, as a reasonable business man would bring to bear on similar business of his own.

Difficulty of divided duty.

The peculiar difficulty lies in the divided duty of the banker towards the true owner and his own customer, and the possible clashing of their interests.

It might be an awkward matter for the banker to manifest suspicion of his own customer ; but if he refrained from acting on such suspicion, he might easily render himself liable to the true owner, as having neglected his duty to him.

Some phases of duty to the true owner have been established by decision. CHAP. XVII.

It was, at one time, a common superstition among bankers that the collecting banker is not concerned with the indorsement on an order cheque. Duty of
collecting
banker to
verify
indorsement.

The omission, however, to see that such indorsement is in order, at least ostensibly, has been distinctly recognised as negligence on the part of the collecting banker. In *Bavins, jun., and Sims v. London and South-Western Bank*, [1900] 1 Q. B. 270, the Court of Appeal held the collecting bank guilty of negligence in not detecting that an indorsement did not correspond with the name of the payee, though the discrepancy had apparently escaped notice even in the Court below. In *Bissell v. Fox*, 51 L. T. N. S. 663 ; 53 *ib.* 193, and other cases, Courts have held that a "per pro." indorsement put the collecting bank on inquiry, which it could not do if they were not bound to look at the indorsement. In *Turner v. London and Provincial Bank*, Times newspaper, March 28, 1903, the fact that indorsements on two cheques payable to different persons were in the same handwriting was held negligence in the collecting banker. And, apart from authority, verification of the indorsement of an order cheque paid in for collection would seem a proper matter of ordinary business routine, if only to avoid delay and the necessity of returning it if the indorsement had been casually omitted or made in irregular form. It is plainly a case where the plea of pressure of business should not be admitted.

Sect. 25 of the Bills of Exchange Act enacts that "a signature by procuration operates as notice that the agent has but a limited authority to sign." But, as laid down in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, sect. 25 and sect. 82 are quite independent ; the former has no bearing on the latter. Sect. 25 applies to rights and liabilities while a bill is current ;

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sect. 82 to rights and liabilities after it has been discharged. As Phillimore, L.J., said, at p. 382, "The man who takes a negotiable instrument signed per pro. has notice that he may not get his money. It is a question of infirmity of title. But when once the instrument has been discharged by payment, neither the presenter nor his predecessors or successors in title are put under a liability to repay because he or they had originally notice that they might not get their money." The real significance and efficiency of this form of indorsement in the case of the collecting banker is as a matter for consideration in the question of negligence. (*Morison v. London County and Westminster Bank*, *ubi sup.*; cf. *Crumplin v. London Joint Stock Bank*, 30 Times L. R. 99, where Pickford, J., said "per pro." did not necessarily put the collecting banker on inquiry.) Any signature which purports to be put on by delegated authority is, for this purpose, a signature by procuration; the fine distinctions which have been drawn between "per pro." and "for" or "pro." appear irrelevant in this connection.

Bills executed
by companies.

It would seem that all executions of bills, notes, or cheques in the name of a joint stock company, should be regarded as signatures by procuration. Sect. 77 of The Companies (Consolidation) Act, 1908, treats all such documents as made, accepted, or indorsed on behalf of the company, whether the execution be in the name of the company or expressly stated to be on its behalf or account. This view is somewhat supported by the legal fiction which affects all persons dealing with a company with implied notice of its constitution and powers.

Sect. 24, which deals with forged and unauthorised signatures, at one time presented considerable difficulty with regard to signatures authorised for one purpose but employed for another. In *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, it was decided that a signature which was authorised for one purpose could

not become a forgery if utilised for another. What was not a forgery *quoad* the paying banker could not be one as against the collecting banker. CHAP. XVII.

Where a "per pro." signature becomes material to the collecting banker is where it forms an intimation that the customer holds the cheque in a capacity and for a purpose inconsistent with the way he proposes to deal with it, that is, paying it into his own private account. Even in this connection, it seems to do little more than emphasise the warning conveyed by the form of the instrument and the position of the customer.

But a procuration signature does not oblige the collecting banker to inquire into matters collateral to the authority to sign, or to see to the disposition of the proceeds of the cheque.

If the indorsement, though made under due authority, were subject to some condition which is unfulfilled, that cannot affect the collecting banker (cf. *Re Land Credit Company*, L. R. 4 Ch. 460); and so long as the signing and application are within the authority, the agent's motive or subsequent misappropriation of the proceeds is immaterial, in the absence of anything calculated to arouse suspicion. (*Bank of Bengal v. Macleod*, 7 Moore P. C. 35; *Bryant & Co. v. Quebec Bank*, [1893] A. C. 170; *Hambro v. Burnand*, [1904] 2 K. B. 10.)

In *Hannan's Lake View Central, Ltd. v. Armstrong & Co.*, 16 T. L. R. 236, Mr. Justice Kennedy held it negligence in a bank to collect for their customer, one Montgomery, the secretary of the plaintiff company, a crossed cheque of which the company were payees, and which was indorsed "Hannan's Lake View Central, Ltd., H. Montgomery secretary." Montgomery had authority to indorse thus on behalf of the company, but only for the purpose of paying such cheques into the company's account, which, to the knowledge of the defendant bank, was kept at another London bank.

Indorsement
by secretary
on behalf
of company.

CHAP. XVII.

The decision was not based, as it might have been, on the indorsement being in effect a procuration one, but on the ground that it was apparent, on the face of the transaction, that Montgomery was using for himself a valuable document which bore evidence of having been created for the benefit of his employers, and being their property ; that the whole course of business was opposed to the idea that the secretary of a company was likely to have been paid money due to him, as salary or otherwise, by the authorisation of the indorsement by himself to himself of a cheque payable to the order of the company ; and that in accepting such a cheque so indorsed, for his private account, the defendants had failed in their statutory duty to the true owner, and lost the protection of sect. 82.

This view has been recognised as absolutely sound in subsequent cases, including *Morison v. London County and Westminster Bank*, the latest case being *Souchette v. London County and Westminster Bank*, Journal of Institute of Bankers, xli. 73. The only safe course for a collecting bank is to refuse to collect for the private account of any official of a company any cheque which on the face of it or in the light of surrounding circumstances suggests that it was intended as payment to the company. Where the cheque is to the company or order and is indorsed by the official "per pro.," the thing is hopeless. In *Morison v. London County and Westminster Bank*, at p. 383, Phillimore, L.J., speaks of "cases of cheques in favour of the principal, indorsed by the agent 'per pro.' and then paid by him into his private account, a most suspicious proceeding." The only possible suggestion, that the cheque was given the official in payment of salary, was rejected by Kennedy, J., as above stated, and derided in *Morison's Case*. When the cheque is to bearer, the contention is not so obviously impossible. It does not strike one as a likely method for a company

to adopt that they should pay an official by a cheque payable to themselves or bearer, but it was treated as not calculated to arouse suspicion in *Morison's Case*. In the Court of Appeal in the *Gordon Case*, [1902] 1 K. B., at p. 261, Collins, M.R., suggested that there was evidence of negligence on the part of the bank, though the jury had negatived the existence of negligence. Presumably he refers to the taking of a cheque payable to a firm for the private account of a man known to be an *employé* of that firm, and there were bearer cheques in that case, classes 2 and 7. The servant of a company stands on the same footing as the servant of a firm. On the other hand, a distinction was drawn between order and bearer cheques of this nature in *Souchette v. London County and Westminster Bank*, *ubi sup.* So long as the matter is in any way doubtful, bankers would be well advised to be very cautious before taking even a bearer cheque from a known official which was more likely to be meant for his principals than for him.

On the same principle, it is negligence to take a cheque made payable to a partnership for the private account of one of the partners. (Cf. *Ex parte Darlington, &c., Bank*, 4 De G. J. & S. 581; *Bevan v. National Bank*, 23 T. L. R. 65.) *Backhouse v. Charlton*, 8 Ch. D. 444, which might be cited as an authority to the contrary, was not strictly a case of collecting; it was a transfer from partnership to private account by cheque drawn by one of the partners, which cheque the banker was under obligation to honour.

It would be obvious negligence to collect for a man's private account cheques made payable to him in his official capacity, such as "Collector of Rates," "Collector of Inland Revenue," or the like, unless the banker is satisfied that the customer has the authority of his superiors to pay such cheques into private account. The author has in mind a case where a cheque payable to an Irish collector of excise, *eo nomine*, was paid into

Partnership
cheque for
private ac-
count.

Cheques to
officials.

CHAP. XVII. his private account. It was suggested that it might have been paid him in discharge of a legacy. And the same is the case where on the face of the thing it is obvious that the payee held the cheque in an official capacity and the cheque, although indorsed by him, is paid into a private account. (*Ross v. London County and Westminster Bank*, [1919] 1 K. B. 678.) In that case the cheques were payable to an official in that capacity, indorsed by him, stolen by an employee and paid by the latter into his private account with the defendant bank. There was conflicting evidence by bank managers as to how they regarded a payment in of this class. The case was decided against the bank.

The mere fact that the customer is a stockbroker or fills some other position which involves his having other people's money in his hands for investment or other business purpose does not, of course, affect the banker with notice or put him on inquiry, and he is perfectly entitled to treat all cheques paid in as absolutely the customer's own. (Cf. *Thomson v. Clydesdale Bank*, [1893] A. C. 282.)

Condition of
customer's
account.

The question has more than once been raised whether the existing condition of a customer's account ought to influence the banker's mind when that customer pays in a large cheque for collection. If a man with a habitually small account or one on which the credit balance has steadily dwindled, or which is slightly overdrawn, suddenly pays in for collection a cheque for a very large amount, is that a suspicious circumstance calculated to put the banker on inquiry?

Little or no guidance can be derived from the cases which have dealt with the point, owing to the diversity of view of the judges.

In *Crumplin v. London Joint Stock Bank*, 30 Times L. R. 99, Pickford, J., attached some weight to it.

In *Commissioners of Taxation v. English, Scottish,*

&c., *Bank*, 36 Times L. R. 305, an account was opened with £20, and the next day a cheque for £786 18s. 3d. payable to bearer was paid in. The Privy Council saw nothing in this to excite suspicion or possible inquiry. CHAP. XVII.

In *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, Lord Reading, L.C.J., set out with great minuteness the progressive increase of the cheques paid in for 5 years, and came to the conclusion that such yearly increase would not of itself arouse doubt or suspicion, and, looking at the figures he quoted, such conclusion seems quite reasonable, and consistent, as he said, with increased salary or emoluments; a solution not so applicable to the Privy Council case above quoted.

The dominant opinion of bankers is against the significance of sudden fluctuations; they contend that the customer may have been keeping his account low in anticipation of this very payment or may have drawn out all available funds to make some investment of which the payment in represents the realisation. This view acquires some sanction from *Thomson v. Clydesdale Bank*, [1893] A. C. 282. But the opening an account with a nominal sum, speedily followed by the payment in of a large one, is not so readily accounted for.

Making Inquiries as to Customer on opening Account

In *Turner v. The London and Provincial Bank*, Journal of the Institute of Bankers, xxiv. 220, evidence was admitted as proof of negligence that the customer had given a reference on opening the account and that this was not followed up.

In *Ladbroke v. Todd*, 30 Times L. R. 433, Bailhache, J., held the bank negligent because they did not make inquiries about a proposing customer, describing this as an ordinary precaution other banks took, bankers or bank officials having in that case given evidence that they made inquiries in such cases.

CHAP. XVII.

The author is not in a position to say how far this is common practice with banks ; if it is not, it might be desirable to be prepared with evidence to the contrary in any case where it was anticipated the point would be raised.

As to the Privy Council *dictum* on this point in *Commissioners of Taxation v. English, Scottish and Australian Bank*, see *ante*, p. 292.

Banks have sometimes put forward, as evidence that they exercised due caution about the collection of a cheque, the fact that, before crediting it, they inquired from the paying bank whether it would be paid on presentation. It is obvious that such a proceeding affords no safeguard to the true owner. The paying banker could have no means of knowing in whose hands the cheque might be ; the inquiry, so far as he is concerned, only relates to the state of his customer's account, and the precaution, as pointed out in *Bissell v. Fox*, *ubi sup.*, and *Ogden v. Benas*, L. R. 9 C. P., at p. 516, is one taken by the collecting banker exclusively in his own interest and for his own benefit.

Inquiring
fate.

Special Collection

In *Turner v. London and Provincial Bank*, *ubi sup.*, the fraudulent customer had asked for the cheques to be specially collected. Evidence was given that it is a common practice for banks to make special collections of cheques for customers—a matter for the banker's discretion. Special collection may be desired for a perfectly legitimate purpose ; it may be desired in order to get the money before suspicion is aroused.

The " Not negotiable " Crossing

In *Great Western Railway v. London and County Bank*, [1901] A. C. 422, Lord Brampton said, " That the respondents in good faith received payment of the cheque is

beyond question. I am not, however, quite so sure that it was altogether 'without negligence,' for I must assume the manager at Wantage knew the meaning and legal effect of the crossing with the words 'not negotiable.' This point, however, does not appear to have been raised, and certainly there was no finding upon it at the trial. I will reject it therefore for present purposes." The obvious suggestion is that a banker cannot accept for collection a cheque marked "not negotiable," from anyone but the payee, without negligence; or, at least, that the fact of the cheque being so marked is sufficient to put the banker on inquiry. It was confidently hoped that this idea had been rejected and abandoned. Unfortunately, it has been, though somewhat hesitatingly, resuscitated by Lord Reading in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356. At p. 373 he says, "The addition of the words, 'not negotiable,' and in some cases 'not negotiable, account payee,' to some of the crossed cheques has, in my opinion, no bearing upon the matters to be decided in this case. The protection of sect. 82 is afforded to cheques marked 'not negotiable' as well as to cheques not so marked. It is certainly not conclusive evidence against a banker who collects crossed cheques so marked. Even if I assume that the taking of a crossed cheque bearing these words would be some evidence of negligence it could not affect my decision upon the later cheques, as the other considerations to which I have referred would outweigh any value I could attribute to such evidence."

While dealing with this side of the question, it may be noted that in *Turner v. London Provincial Bank*, Journal of the Institute of Bankers, xxiv. 220, evidence was given to show that at some banks especial care is taken in dealing with cheques marked "not negotiable." That case was early in 1903: possibly such evidence would not be available now.

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In view of Lord Reading's *dictum*, following on Lord Brampton's somewhat cryptic utterance, it unfortunately seems advisable to reproduce the remarks on the subject embodied in former editions of this book, which would otherwise have been omitted.

Result of the
legislation.

It is submitted that there is no foundation for any such suggestion. Everything in the Bills of Exchange Act points to the diametrically opposite conclusion.

The provisions of sections 81 and 82 were formerly combined in one section, sect. 12 of the Crossed Cheques Act, 1876 ; the substance of that section being as sect. 81, and the present sect. 82 appearing as a proviso thereto. The whole controversy in *Matthiessen v. London and County Bank*, 5 C. P. D. 7, decided in 1879, was whether the proviso applied to cheques other than those crossed "Not negotiable." The Court held that it did ; the proviso, though in that form, operating as a substantive enactment, and not being in terms restricted to any particular form of crossing.

It would indeed be extraordinary if the Bills of Exchange Act, in emphasising this decision by reproducing the proviso as an independent section, had excluded from its operation the very class of crossing to which alone it had been contended it applied. (Cf. *per* Pickford, J., in *Crumplin v. London Joint Stock Bank*, 30 Times L. R. 99.)

Next the whole scheme of sect. 76 makes the words "not negotiable," where they appear, part of the "addition" which "constitutes a crossing," the existence of which crossing renders the cheque a crossed cheque. The words are as much a part of the crossing, and as much an element of a cheque crossed generally or specially, as the two parallel transverse lines or the name of a banker. The words used in each case are "with or without the words 'not negotiable.'" When, therefore, sect. 82 uses the phrase "without negligence" in

reference to a crossed cheque, it must mean negligence independent of anything which simply goes to constitute a crossed cheque.

Again, sect. 81 specifically limits the effect of the not negotiable crossing to title gained or conferred by the person taking the cheque so crossed. The collecting banker neither acquires nor confers any title to a cheque coming to his hands for collection and being so dealt with.

Again, where there is prior absence or defect of title, the effect of the not negotiable crossing is to render the customer's title null or defective, the precise contingency against which the banker is protected by sect. 82. The not negotiable crossing, and the provisions of sect. 81 are as independent of sect. 82, as sect. 25 and sect. 82 were held independent of one another in the *Morison Case*, and for the same reason. Sect. 81 deals with the cheque during its currency and governs the rights of transferees; sect. 82, as there shown, deals only with the proceeds after the cheque has got home.

Seeing that it is absolutely impossible for the collecting banker to verify any indorsement other than that of his customer, the addition of "not negotiable" to a crossing would, on the view here combated, mean either that a transferee, however good his title, could never get the cheque paid, or that the banker would have to collect it blindfold, at his own risk, a condition of things the Legislature can hardly have contemplated.

Finally, the statutory authorisation of the not negotiable crossing for the protection and benefit of the public, and the consequent obligation on bankers to collect such cheques for their customers as much as crossed cheques not bearing those words, render applicable the canon of construction which requires that the banker should receive equivalent safeguards; which he would not do if any distinction were made, as regards him, between the two classes of cheques.

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Lord Brampton's *dictum* was referred to in the earlier stages of the *Gordon Case*, but received no sanction therein, and the point was never mentioned in the House of Lords.

It is submitted that the above reasons are sufficient to justify the contention that the "not negotiable" crossing has nothing to do with the collecting banker or he with it.

Account Payee

One unquestionable and conclusive evidence of negligence in the collecting banker is to take a cheque crossed with the words "account payee" or "account so and so," for an account other than that indicated. This has even been held to apply where the cheque was payable to a specified payee or bearer. It is difficult to write with reticence about this unauthorised addition to cheques. As shown before (*ante*, p. 176), these words have no effect in limiting the transferability or full negotiability of an order or bearer cheque. It has never been even suggested that they have. If put on by anyone except the drawer they cannot be treated as any part of his mandate, because there is no statutory enactment enabling the holder to exercise deputed power in this respect, as there is in the case of a regular crossing or the words "Not negotiable" added to one. Besides, the mandate, direct or deputed, is only efficacious as between the drawer and his own, that is, the paying banker. The effect accorded them as against the collecting banker cannot be ascribed to the non-contractual care for the true owner's interests, because they have no statutory sanction and connote no commensurate protection. Were the matter one of first impression, it might well be argued that any banker, being confronted with an absolutely contradictory and ambiguous document, one which on the face of it purports

to be payable to order or bearer and at the same time indicates that it and its proceeds are to be devoted to a specified individual, was entitled to regard it in its true legal aspect, namely, as a negotiable instrument, available in any one's hands, on which the superadded words were purely nugatory; and that, acting on this legitimate construction, he could not be taxed with negligence. Reasonable as this view is, it cannot be accepted. The practice has been tolerated so long and recognised to such an extent both by judges and bankers, that it would be absolutely hopeless for any collecting banker to set up that these words conveyed no meaning to him or that he was justified in ignoring their existence on a crossed cheque. So long ago as 1852, the cheque in *Bellamy v. Marjoribanks*, 7 Ex. 389, had words of this nature upon it, and significance was attached to the fact; their addition has year by year become more common, and the present custom of, at any rate, the majority of bankers is not to take in a cheque so marked for any account other than that indicated. In very many applications for payment, it is now specified that cheques sent are to be crossed "account payee" or "account so and so." If the debtor wishes to make the Post Office the agent of the creditor, and not his own, and so shift the risk of theft or loss in the post, he must send a cheque strictly in accordance with the request, and so is bound to mark it accordingly. In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, Bigham, J., regarded the addition as a direction to the receiving bank how the money was to be dealt with after receipt. Inasmuch as the proceeds must, of necessity, be put to the account for which the cheque is received, this involves that the cheque can only be taken for the indicated account.

In *Bevan v. National Bank*, 23 T. L. R. 65, Channell, J., distinctly held that it would be negligence to take

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In *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, the point was not material, since the cheques so marked went into the designated account. Lord Reading, L.C.J., says, at p. 374, "The words 'account payee' are to be found on the crossed cheques made payable to Abbott or bearer, or Abbott or order, defendants or bearer, and defendants or order. The words account payee are a direction to the banker collecting payment that the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque." It is not easy to see the object or effect of drawing a cheque payable to the collecting bank and marking it account payee. A somewhat analogous practice, for which there is something to be said, is as follows. It is sometimes convenient to make a payment by post direct to a person's account at his bank, say, for a quarterly payment under covenant in a settlement. It enhances safety to draw the cheque payable to that bank or order, cross it either generally or specially to that bank, and mark it "account so and so," its intended ultimate destination. The paying bank pay to a banker or the specified banker, and the collecting bank, although they are nominally payees, do in fact receive payment for a customer within sect. 82, while at the same time there would be a remedy against them if they applied the proceeds otherwise than to the indicated account.

In *House Property Co. of London v. London County and Westminster Bank*, 84 L. J. K. B. 1846, Rowlatt, J., treated it as negligence to collect a cheque payable to a named payee or *bearer* for an account other than that of the named payee, and, in the above quotation, Lord Reading seems to contemplate the same effect of a similar cheque in other circumstances than those of the case before him.

This seems a further extension of the effect of this unauthorised addition, a more startling illustration of its indirect effect in limiting negotiability of what the Act makes negotiable. Still, if an order cheque can be so treated there is no logical reason why a bearer cheque should not be, each being by nature equally negotiable, though by different means. CHAP. XVII.

Exigencies of Business

In *Ross v. London County and Westminster Bank*, 35 Times L. R. 315, the controversy was revived as to the measure of knowledge and experience, the non-attainment or non-application of which is to be accounted negligence in a bank and so deprive it of the protection of sect. 82. The question is a difficult one. From the point of view of the customer or the public, the contention would be that if the bank hold out a man as put there to do certain things, such as taking in cheques for a customer's account, they impliedly represent him as competent for the post, and that it is their own fault if from want of experience he falls short of the requisite standard. On the side of the bank it would be pointed out that it is not within the limits of possibility to have someone of the status of a bank-manager to attend to every customer of the bank, that the "without negligence" of sect. 82 refers to negligence on the part of the "banker" himself or the joint stock company which represents the old time banker, not of the individual subordinate or clerk, and that, if due care in selection, supervision, and allotment of work is exercised, negligence cannot be attributed to the principal for a personal slip or oversight on the part of such official. The rejoinder would be, "The internal arrangements of your bank do not concern us; a corporation cannot be actually guilty of negligence; therefore the law holds it responsible for the negligence of each and every one of its servants;

CHAP. XVII. for example, in a railway or street accident." Judicial expressions of opinion have varied on the point; in *Ross v. London County and Westminster Bank*, *ubi sup.*, the latest authority, Bailhache, J., did recognise that the same standard of experience and care is not to be expected from a cashier as from a bank manager, thus approving, so far, the banker's point of view, but he went on to say, "I must, however, attribute to the cashiers and clerks of the defendants the degree of intelligence, &c., one ordinarily required of persons in their position to fit them for the discharge of their duties."

A similar discussion is as to exigencies and pressure of business.

One school, of which perhaps Lord Bramwell was the protagonist, refuses to give any countenance to this plea or make any allowance on this ground. A learned judge has said that if the staff of a bank cannot satisfactorily cope with the business, the bank must increase its staff.

The other party urge that the law exacts from no man the impossible; that as between customer and banker the implied contract is reciprocal, so that if the customer is only bound to do what is reasonable no greater burden can be laid on the banker; that, as regards the rest of the public, there is no duty, therefore no possibility of negligence, save perhaps the highly artificial one with respect to collecting or paying crossed cheques; and that a sudden rush of business is in the nature of *force majeure*, which a prudent man is not bound to anticipate or provide against.

There does not appear to be any definite authority on the point; in *Ross v. London County and Westminster Bank*, *ubi sup.*, Bailhache, J., says, "I am told that during the period in question the cashiers and clerks at the branches were being constantly changed, and that some of them could not have had very long experience of their work." He then uses the words above quoted,

which do not suggest much concession to special circumstances, presumably due to the war.

Circumstances condoning Negligence

To the case of *Morison v. The London County and Westminster Bank*, bankers are indebted for a valuable qualification or exception to the "without negligence" of sect. 82. What might or would constitute negligence on the part of the collecting banker loses that character if the acts or omissions adduced as evidence of negligence were induced or encouraged by the action or inaction of the true owner. The frauds in the *Morison Case* extended over a number of years; some of them, at least, were actually known to the true owner, others, the Court found, or assumed, came to the knowledge of accountants employed by him; some of the cheques which had been wrongfully dealt with, and with which it was sought to charge the defendant bank, had been the subject of subsequent arrangement between the fraudulent person and his employer, the plaintiff, and debited to him in the books of the business. Not a word about this had been communicated to the defendant bank, the plaintiff's explanation being that he always believed that Abbott, the employee, was going to turn over a new leaf and be honest for the future.

In a state of affairs so flagrant, it is unthinkable that the bank should be liable, and the Court of Appeal evolved two effective lines of defence.

They recognised that there was no direct contractual duty from the plaintiff to the defendants, no relation of banker and customer, the defendant bank not being the plaintiff's banker; no obligation, in the defendants' interest, on the plaintiff to examine his own pass book. Even if the plaintiff had banked with the defendants, the existence and effect of any such duties might have been doubtful; the *Macmillan Case* had not then rescued

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the mandant and mandatory question from its state of chaos, and the efficacy of the pass book as a check on the customer was, and still is, in English law, negligible.

There being no duty from plaintiff to defendants, there could be no negligence, which is a breach of duty ; not even, strictly speaking, contributory negligence.

The only recognisable duty in the whole business was the unilateral, statutory one on the collecting banker not to be negligent.

The Court of Appeal happily surmounted the difficulty. Their line of reasoning ran thus :—

Primâ facie, these are all cheques which no bank ought to take for the private account of the subordinate who signed “per pro.” No reasonable business man would do so : given a duty to take care, it would be a breach of that duty, so negligence. The bank is only protected if it has not been negligent ; it has been negligent, therefore is not protected. That is the *primâ facie* view : is there anything which rebuts it ?

The measure of care required to eliminate negligence is what a reasonable business man would do or not do, taking surrounding circumstances into consideration.

Take into consideration the circumstances in this case, as they must have appeared to the bank.

Of course they had no knowledge of the frauds, of the condonation of them, of the monetary amends or compromises between the plaintiff and his fraudulent subordinate.

But what would a reasonable business man think and do when these transactions went on for, say, two or three years, the cheques paid in by the subordinate honoured by the plaintiff’s bank, and the proceeds drawn out by that subordinate, without comment or complaint on the part of the plaintiff ?

It is not perhaps quite fair to test the actual earlier taking of the cheques by the standard of the reasonable

action of the ordinary business man. All he has to guard against in taking a negotiable instrument is the possible imputation of notice ; the collecting banker is bound to exercise greater vigilance in order to keep clear of negligence.

But after that, the criterion is the same. And the ordinary business man would say to himself, " It is somewhat unusual that this man should be using cheques primarily intended for his employer for his own benefit. But the employer must be cognisant of it by this time. He keeps his own books, he has got his pass book, which would show him at once that these cheques never reached their account ; he in any case presumably has his books audited ; the man is still with him in a confidential position ; the amount paid in in this way has increased year by year, which shows he is getting increased salary and so that he is satisfied with him ; it must be all right. I shall go on as I have been doing." And he does so. What was reasonable deduction and consequent action in the individual is equally reasonable in the bank, therefore not negligence. On this view the Court decided for the bank, in respect of the later cheques. As to the earlier, they held that by his conduct and by withholding all information from the bank as to the employer's improper dealings with the cheques, the plaintiff must be held to have adopted those cheques. He had obviously done so in fact in the case of those which he charged against the man in his accounts with the business. And so they gave judgment for the bank on the whole claim.

It must be admitted that this case was exceptional ; such a combination of circumstances is not likely to occur often. The doctrine of reasonable interpretation of the attitude of the possible true owner as negating negligence is only applicable to protracted dealings. Still it should be borne in mind that the decision, so far as it proceeded on the ground of reasonableness and so absence

CHAP. XVII. of negligence, was altogether independent of the exceptional features which were unknown to the bank; it took into account only those which were obvious or legitimate deductions; so that the case may still be a useful authority in less aggravated circumstances.

As to the point of adoption of the earlier cheques. The application of the doctrine has hitherto been confined to controversies between the paying banker and the customer, so far as the author knows. Its extension to the collecting banker seems amply justified.

In the *Morison Case* it was not a question of forgery. As before stated, the Court held that a cheque which was drawn within authority as regards the paying banker, which those cheques were, could not be a forgery with respect to the collecting banker. There used to be a theory that a forgery could not be adopted. It may be true that it cannot be ratified, but beyond question it may be and often has been adopted. This part of the case falls, therefore, within the consideration of forgeries, and will be found under that head hereafter.

Clause 2.—“ Receives payment for a customer ”

These words in sect. 82 have given rise to much litigation, culminating in the *Gordon Case*, necessitating the passing of the Bills of Exchange (Crossed Cheques) Act, 1906.

As hereinbefore stated and as hereinafter shown, they are intended to, and do, confine the protection of the banker to what he does in the character of agent for his customer. But there is one exception, which may as well be dealt with here, so as to clear the ground.

An agent cannot usually depute his authority or functions. A collecting banker may employ another bank as his agent for the collection of the cheque. The right is recognised by the power given to the banker to cross a cheque crossed specially to himself again specially

to another bank for collection by sect. 77 (5), and the second banker is described as "an agent for collection" in sect. 79 (1); the utilisation of a clearing by a non-clearing bank is a practical necessity, and was admitted by Bigham, J., in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, to be an incident of the ordinary process of collection, and not to impair the protection under sect. 82. In that case the question arose whether the transmitting bank violated the character of an agent by subjecting the cheques to a lien of the receiving bank, arising from the former being indebted to the latter. Bigham, J., held that there was no such lien. This is probably wrong but it avoided decision of the point.

Subject to this, and reading the last words of sect. 82 with the earlier ones (see the *Gordon Case*, [1903] A. C., at p. 248, *per* Lord Lindley), the banker must only receive payment of the crossed cheque for the customer.

Must act only
as agent.

Lord Macnaghten says (*Gordon Case*, [1903] A. C., at p. 245): "The protection conferred by sect. 82 is conferred only on a banker who receives payment for a customer, that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents, they are not within the protection of the section." And he subsequently describes the functions of a bank acting within the section as those of "a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer." It cannot be denied that the section, dispassionately read, indicates agency pure and simple. The history of the legislation on the point is in favour of the same view. (See *Matthiessen v. London and County Bank*, 5 C. P. D. 7, and the judgment of Collins, M.R., in the *Gordon Case* in the Court of Appeal, [1902] 1 K. B. 242, expressly approved by Lord Macnaghten in the House of Lords.) There is absolutely nothing in the whole of the legisla-

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tion affecting crossed cheques which in the remotest degree necessitates the intervention of the collecting banker in any capacity other than that of an agent pure and simple. And the House applied here the canon of construction which they ignored in the case of the draft issued by a branch on the head office; namely, that the protection must be limited to the enhanced risks imposed by contemporary legislation. Lord Macnaghten, at p. 246, quotes with approval the words of Collins, M.R., in the Court of Appeal: "The protection afforded by sect. 82 must be limited to that which is necessary for the performance of the duty which, by the legislation as to crossed cheques, was imposed on bankers."

It must therefore be taken that the banker who desires the protection of sect. 82 must confine his dealings with the cheque to such as are strictly compatible with the character of an agent and must receive the money in that capacity.

Amending
Act of 1906.

The amending Act of 1906 does not impugn this position; it merely provides that the protection of sect. 82 shall not be lost by crediting as cash, treating such crediting as not inconsistent with agency. Whether, and if so how far, it affects the consequences of crediting as cash, apart from sect. 82, will be dealt with hereafter. The *Gordon Case* turned on two points. First, that crediting as cash constituted the banker a holder for value. Second, that a man cannot hold a cheque and receive payment thereof only as an agent, if he be himself the holder for value of it. For the purpose of sect. 82, so far at any rate as crediting as cash in the banker's own books is concerned, the Amending Act of 1906 has rendered the first point immaterial.

Holder for
value.

As to the second, Lord Macnaghten said, [1903] A. C., at p. 245: "It is impossible, I think, to say that a banker is merely receiving payment for a customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

It may be noticed that the cheques in the *Gordon Case* to which Lord Macnaghten refers bore only forged indorsements of the payee's name, as would frequently occur in other cases where the banker has to rely on sect. 82. In such circumstances the banker could never be a holder at all within the definition of the Bills of Exchange Act. In the case of forged indorsement, the position of the banker which is inconsistent with agency must be regarded as that of a man who, but for the forged indorsement, would be a holder for value, a man who has taken the cheque as transferee and as his own. This attitude is equally outside the wording of the section. Believing he is entitled to the money, the banker receives it for himself, not only for the customer. The cheques in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, were in like condition, with forged indorsement. Yet Bigham, J., treated the collecting banker as holder.

In any case, Lord Macnaghten's proposition, if accepted in its broadest signification, apparently raises a difficulty with regard to the banker's lien. Question of lien.

"Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien" (Bills of Exchange Act, s. 27, sub-s. 3).

A banker has, by implication of law, a lien on all bills or cheques coming into his possession *quâ* banker, to the extent of all monies due from the customer. (See *post*, "Securities for Advances.")

Cheques for collection unquestionably come into the banker's possession in the course of his business as such.

If the customer is overdrawn at the time, the banker is, in the words of the sub-section, deemed to be a holder for value to the extent of such overdraft. But

CHAP. XVII. it is hardly to be supposed that Lord Macnaghten contemplated this state of circumstances as excluding the banker from the protection of sect. 82. If the position of a mere conduit pipe is insisted on, if the receipt must be only for the customer, and if the admixture of the smallest element of holder for value, even under this sub-section, is to destroy the protection, it would follow that the banker who took a thousand pound crossed cheque in the ordinary course for collection would be debarred from protection if the customer were temporarily overdrawn a few pounds. The conclusion appears impossible. *Clarke v. London and County Bank*, [1897] 1 Q. B. 552, *nf.*, p. 207, has never been overruled, and the observations of Romer, L.J., in *Great Western Railway Co. v. London and County Bank*, [1900] 2 Q. B. 464, on the subject of the lien, seem perfectly justified, if confined to a real case of lien. Again, the banker is under a practical obligation to the customer to receive and present the crossed cheque, the relation of banker and customer enuring notwithstanding the overdraft, and he is therefore in the position which warrants his claim to protection.

Interpre-
tation of
"he is
deemed."

One explanation may be derived from the words "he is deemed." As shown by *Hill v. East and West India Dock Co.*, 9 A. C. 448, these words do not necessarily entail all the consequences which would ensue were the supposed state of facts actually existent; they must be interpreted according to the object of the enactment. This sub-sect. 3 of sect. 27 is one of the group dealing with consideration; its object is merely to establish the validity of an existing lien as consideration *pro tanto*. Its scope and purview relate only to cases where the party holding the bill is suing on it; and the limited character of holder for value involved may fairly be regarded as existing only for the purposes for which it is conferred. Lien, being the right to hold another

man's property until a debt is paid, is not only no indication of property, but is absolutely inconsistent therewith. The ordinary holder for value is the person in whom the absolute property of the bill is vested. The use of the word "lien" in the sub-section points therefore to the artificial and restricted nature of the holdership for value therein referred to.

It may fairly be urged that it is optional with the banker whether he will claim or exercise his lien, that there is nothing to show, when he takes the cheque or receives the money, that the action is not solely on behalf of the customer; the banker may be relying on setting off the debt against the money received for the customer, an equally efficacious remedy and one which presupposes the separate existence of the two amounts as debts. A far more definite and specific decision is necessary to overrule *Clarke v. London and County Bank*, and to sanction the startling proposition that a banker taking a crossed cheque in the ordinary course for collection is debarred from protection by the mere fact of the customer chancing to be slightly overdrawn.

What Lord Macnaghten was probably referring to was the case of a real holder for value in the ordinary sense of the term; that is to say, a transferee, who takes the entire property in the instrument. That character is really incompatible with agency; and where a banker has become holder for value as a transferee, where the absolute property has vested in him, or would have done but for forged indorsement, it is certainly difficult to see how, in any sense, he can only receive payment of the cheque for the customer, or for anyone but himself.

Transferee
and holder.

Interpreted in this sense, Lord Macnaghten's remarks are clearly well founded. The question, therefore, resolves itself into this: did the banker who claims protection under sect. 82 take the cheque as trans-

CHAP. XVII. feree, or did he hold it for the customer, subject to his lien for the customer's indebtedness, if any, and if he chose to exercise that lien ?

Cases of
transfer.

If a banker gives cash for a cheque over the counter, he takes it as transferee. (*Great Western Railway Company v. London and County Bank*, [1901] A. C. 414.) If it is paid in for the express purpose of reducing an ascertained overdraft, the banker takes it as transferee, the consideration being the pre-existing debt. If it is paid in on the express understanding that it may be drawn against at once, and is so drawn against, the banker takes it as transferee. Bowen, L.J., said in *National Bank v. Silke*, [1891] 1 Q. B. 435, that it was plain from the judgment of the House of Lords in *McLean v. Clydesdale Banking Company*, 9 A. C. 95, and, indeed, was plain enough to commercial men before, that when a cheque was paid into a bank to be placed to the credit of a particular customer, and that bank placed the amount to his credit and allowed him to draw upon it, they were holders of the cheque for value and in due course. So again, where, by course of business, an implied agreement is established to the effect that all cheques may be drawn against as soon as paid in, the banker presumably takes them as transferee, independent of their being actually drawn against. Such transactions really amount to the purchase of the cheque, analogous to the discounting a bill at a future date. As a financial operation it seems almost ridiculous to talk of purchasing or discounting a cheque, which is payable on demand and designed for speedy presentation, or to contemplate a bank gratuitously guaranteeing the payment thereof, to use the expression of the Privy Council in *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281. At the same time a cheque is a bill, and if anyone gives a sum of money down for it or takes it on a promise, express or implied, to give some sum, either in one payment or several payments as drawn against, all conditions exist to constitute

him a transferee, whether he be a banker or not. There may be reasons, such as the desire to oblige the customer or the convenience of transmitting money, which render such proceedings on the part of a banker reasonable, or even expedient.

It would not be safe to assume that the amending Act of 1906 covers the case of cheques credited as cash in the customer's pass book before receipt of the money, and the pass book being delivered in that condition to the customer. The *Gordon Case*, admittedly the origin of that Act, dealt only with crediting in the bank's own books; the words of the Act, "credits his customer's account," might well be confined to such crediting; in *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, Bigham, J., adverted to the distinction between so crediting in the bank's own books, an uncommunicated entry, and crediting in the customer's pass book for his information; and it might well be argued that the latter constituted an authority or invitation to draw on the amount, equivalent to the special agreements above referred to. On the other hand, in *Gaden v. The Newfoundland Savings Bank*, [1899] A. C. 281, the Privy Council declined to hold that the bank had become proprietors of a cheque, had taken it for better or worse, though the amount had been entered in the customer's pass book, and the pass book delivered to her.

The Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), renders unnecessary at present further reference to the *Gordon Case* in relation to sect. 82; but it may be convenient to discuss whether that Act affects the other rights and liabilities arising out of crediting as cash established by that decision.

Apart from the question of liability to the true owner, the *Gordon Case* established, as part of the ratio decidendi, three propositions:

1. That crediting as cash was equivalent to taking the cheque as transferee for value.

B.

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As to crediting in pass book.

Amendment Act of 1906. Bearing other than on sect. 82.

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2. That it entitled the customer to draw against the cheque at once.

3. That the banker was nevertheless entitled to debit the customer with the amount, in the event of the cheque being dishonoured, or the banker being made liable to the true owner.

Proposition 1.

As to the first proposition, the *Gordon Case* was not the first occasion on which it had been enunciated. Crediting as cash, apart from actual drawing, was held to constitute the bank holder for value in *ex parte Richdale*, 19 Ch. D. 409, and *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715. Unless there is forged indorsement, or the cheque is crossed "Not negotiable," or is overdue, the banker who has credited it as cash has all the rights of a holder in due course against all prior parties to the cheque. It was on this ground that the bank were held not liable on the bearer cheques in the *Gordon Case*. (Cf. *Sutters v. Briggs*, [1922] A. C. 1.)

Proposition 2.

The second proposition follows from the first. If the crediting is to constitute full value for the cheque it must, in reason, be an actual available credit, not a mere entry in the bank books; and the customer must be entitled to the immediate benefit of the consideration for which he parts with the cheque, just as much as a man is entitled to ride the horse for which he has given a cheque. Lord Lindley says, [1908] A. C., at p. 249, "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right." And the whole tenor of the judgment compels the construction that the placing of the cheque to credit has the same effect. Having once credited as cash, the banker is therefore not entitled to return the customer's cheques on the ground of the assets not being cleared. (Cf. *Jones v. Coventry*, [1909] 2 K. B. 1029.)

The right to draw against uncleared cheques, even

when credited as cash, may, of course, be excluded by express agreement or course of business. (See *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465 ; *Bevan v. National Bank*, 23 T. L. R. 65.)

The third proposition, the right to debit the customer with a returned cheque, notwithstanding it has been credited as cash, is recognised by Lord Lindley when he says, at p. 248, "It is no doubt true that if the cheque had been dishonoured, Jones [the customer] would have become liable to reimburse the bank the amount advanced by it when it placed the amount to his credit. This he would have to do whether any cheque, crossed or not, was placed to his credit, and was afterwards dishonoured."

Prior to the *Gordon Case*, namely in 1893, in *In re Mills Bawtree & Co., ex parte Stannard & Co.*, 10 Morrell's Bankruptcy Cases, 193, Vaughan Williams, J., at p. 212, speaking of cheques paid in by Stannard, said as follows : "The answer to this seems to me to be twofold. First, in all probability the cheques paid in were indorsed by Messrs. Stannard. This would give the bankers the right to debit their customer, even though they originally received the cheque as their property as a loan to them. Secondly, even if the cheque was not indorsed, the result in my opinion would be the same, because I think that, just as a cheque may operate as a conditional payment to be avoided if the cheque is not honoured, so a cheque may operate as a conditional loan, creating a debt by the recipient of the cheque to be avoided if not honoured."

On the basis of conditional loan, this is logical enough. No doubt a cheque whether indorsed or not is payment, or very possibly a loan, only on condition of its being honoured. Also the summary process of debiting an indorser may be justifiable where the banker is acting purely as agent. But the position, although Lord Lindley clearly regards it as still existing, seems inconsistent with the later conception of the banker as holder for value. On

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that footing, if the customer has indorsed the cheque there would be a remedy against him as indorser, but only by giving notice of dishonour, and by action at law in the usual manner. It is not easy to see the justification for the banker's usurping all legal functions, and taking a summary remedy into his own hands. If the customer has not indorsed the cheque, the right is still more exceptional. A transferor by delivery is not liable on the instrument (sect. 58, sub-sect. 2) ; nor on the consideration, unless such consideration was an antecedent debt, or possibly, if it be shown that the transfer was not intended to be in full discharge of the liability. The doctrine enunciated by Sir M. Chalmers, that if a man cashes a cheque payable to bearer for the convenience of the holder, and it is dishonoured, he can recover the money, depends on very doubtful authority. Apart from Lord Lindley's ruling, the claim to debit such cheques would seem to rest only on the custom of bankers. That ruling, however, expressly recognises the right, notwithstanding the crediting as cash ; and the words " any cheque " show that the customer's indorsing or not does not affect the question. (Cf. also *Bavins, jun., and Sims v. London and South-Western Bank*, [1900] 1 Q. B. 270.)

Propositions
not affected
by Act of
1906.

It is submitted that these three propositions remain untouched by the amending Act of 1906.

The whole object of that Act was simply to restore to the banker the protection against the true owner, of which the *Gordon Case* had deprived him. Its scope is confined to the relation between the banker and the true owner, other than the customer. It enacts that the banker receives payment for the customer within the meaning of sect. 82, notwithstanding he has credited as cash. " Within the meaning of sect. 82 " imports so far as is necessary to ensure protection against the true owner, which is the only object and effect of that section, in which customer and true owner are treated almost antithetically.

There is absolutely nothing in sect. 82 which applies to any rights or liabilities of the banker against or to his customer or parties other than the true owner, and it would be perverting language to vouch the amending Act as introducing any such provision. It would be anomalous if such rights and liabilities differed in the case of crossed and open cheques, when no legitimate ground could be assigned for such distinction, the doctrine of correlative protection having no application to either class in this connection. And sect. 82 and the amending Act alike deal only with crossed cheques. Finally, those rights and liabilities arise on the crediting as cash, anterior to and independent of the receipt of the money, which is the operation aimed at by the Act ; some, indeed, such as suing prior parties, being only available when the money is not received at all.

In *Re Farrow's Bank, Ltd.*, The Times, July 20th, 1922, the question arose whether, at the time of the winding-up of the bank, it held certain cheques for collection or as holder for value. There was ample evidence both by pass book and paying in slip that cheques paid in were not to be drawn against till cleared. Astbury, J., appears to have made this the ground of his decision that the cheques were held for collection only, but he says : "Since the Bills of Exchange (Crossed Cheques) Act, 1906, it is not arguable that the mere crediting of a cheque paid in to a customer's account, independent of any arrangement between the bank and the customer, converts the bank into a holder instead of an agent within sect. 82 of the Bills of Exchange Act, 1882." This is correct so far as sect. 82 is concerned, in any wider application it conflicts with the judgment of the House of Lords in *Sutters v. Briggs*, [1922] A. C. 1, which seems clearly to support the view herein before expressed.

CHAP. XVII. *Clause 3.—Payment must be received for a customer*

Who is a customer ?

The next condition of protection under sect. 82 and the amending Act is that the crossed cheque be received from and payment thereof received for a person who is properly describable as a customer. Neither in sect. 82 nor any other part of the Bills of Exchange nor in the amending Act is any definition of customer given.

There have been conflicting decisions on the question what constitutes a customer. They will be found, together with the author's views on the matter, under the heading "The Customer," *ante*, Chapter II.

If a man is not otherwise a customer, such expedients as making him draw a counter-cheque for the amount, or entering the transaction under some such head as "Sundry Customers," will be of no avail. (Cf. *Matthews v. Williams Brown & Co.*, 10 T. L. R. 386 ; *Great Western Railway v. London and County Bank*, [1901] A. C. 414, at p. 425.)

Clause 4.—"A cheque"

What included in cheque.

The next word calling for notice in sect. 82 is "cheque."

The section would have no application to a document purporting to be a crossed cheque but to which drawer's signature was a forgery. It would not be "drawn on a banker."

Sect. 82 is in terms confined to cheques proper, but other Acts have brought certain kindred documents within its provisions.

Dividend warrant.

Sect. 95 extends the crossed cheques sections to "warrants for payment of dividend." This would not include a warrant for the payment of fixed interest, *e.g.* on Debenture Stock. As to this and other instruments brought within sect. 82 by sect. 17 of the Revenue Act, 1883, see *ante*, Chapter VIII., "Cheques Generally."

Post Office money orders.

As to Post Office money orders and the collecting banker's liability thereon, see *ante*, p. 165.

As above stated, sect. 82 refers in terms to cheques only. It has now to be considered whether by virtue either of the amending Act of 1906, or the statutes bringing them within the crossed cheques sections, dividend warrants and orders for payment, when crossed, can be safely credited as cash, the same as crossed cheques can now be.

CHAP. XVII.

Bills of
Exchange
(Crossed
Cheques) Act
applies only
to cheques
proper.

The amending Act of 1906 in terms applies only to cheques. It does not provide that it is to be read with the Bills of Exchange Act, but only that it may be cited with that Act as "The Bills of Exchange Acts, 1882-1906," so that the two Acts are not incorporated and cannot be read as one. The Act of 1906 imports no new interpretation of the word "cheque," and the reference to sect. 82 involves that the interpretation must be the same as that in the principal Act, namely, a bill drawn on a banker payable on demand. The title of the Act, which is admissible for general explanatory purposes, states that it is an amending (not an interpreting) Act. It must, therefore, be regarded as introducing a new state of things; not merely as rectifying a judicial misconstruction of a previous existing section and so constituting a general interpretation of that section wherever incorporated or referred to; though if the history of the Act could be utilised, it might well suggest this view. If then the effect of the Act of 1906 is to be extended to documents other than cheques, it must be by virtue of the particular enactments applying the crossed cheques sections to those documents. The possible documents are, first, dividend warrants; second, orders for payment. As to dividend warrants, the enactment affecting them is sect. 95 of the Bills of Exchange Act itself. It runs: "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend." There is nothing here to make a dividend warrant a cheque, or invest it with any other character or incidents than those specifically included in the section. The section merely

As to dividend
warrants.

CHAP. XVII.

picks out certain defined provisions of the particular Act itself, and applies them to dividend warrants. It is not possible to read into the section words to make it run as follows: "The provisions of this Act or any amending Act as to crossed cheques"; and the omission of such words, which are frequently inserted, is significant. It would therefore appear that dividend warrants, if credited as cash, are outside the 1906 Act and sect. 82.

As to orders
for payment.

Orders for payment with receipt attached or otherwise deviating from cheque form are dependent for the benefit of the crossed cheques sections on sect. 17 of the Revenue Act, 1883. That section runs as follows: "Sects. 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument."

Here, again, the section selects particular sections of the Bills of Exchange Act, and extends those specific sections to the documents in question. There is no reference to any possible future amending Act. The words "and shall so extend in like manner as if the said document were a cheque" might at first sight appear to carry the matter somewhat further. To a certain extent they assimilate the document to a cheque; but it is only for the limited purpose of the enumerated sections; they fall far short of altering its intrinsic character or attaching to it incidents arising out of subsequent legislation dealing professedly with cheques alone. Moreover, there is the proviso "that nothing in the Act shall be deemed to render any such document a negotiable instrument." If the Act constituted these documents cheques, they would

of necessity be negotiable instruments. These documents, CHAP. XVII.
therefore, are outside the purview of the Act of 1906.

Clause 5.—“Crossed generally or specially to himself”

The next condition which must be fulfilled in order to entitle the collecting banker to protection under sect. 82 is that the cheque be “crossed generally or specially to himself.”

It must now be taken as finally settled that this clause is confined to cheques already crossed when coming to the banker’s hands ; and that a crossing by the banker himself of a previously uncrossed cheque, under sect. 77, sub-sect. 6, does not render it a crossed cheque for the purposes of this section. (*Bissell v. Fox*, 51 L. T. N. S. 663 ; the *Gordon Case* in the Court of Appeal, [1902] 1 K. B. 242, and in the House of Lords, [1903] A. C. 240, where Lord Lindley says, at p. 249 : “It appears to me that sect. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section.”)

As to the effect, with regard to sect. 82, of one banker crossing to another for collection under sect. 77, sub-sect. 5, see *ante*, p. 314.

As previously intimated, it is in this connection that importance attaches to the question whether, to constitute a crossed cheque, the crossing must be put on by some person authorised by the Act to do so. The typical case would be that of a perfectly innocent, respectable person who has taken an open, order cheque, *bonâ fide* and for value, on which the payee’s or a subsequent indorsement has been forged. He crosses it, either generally or to his own bankers, pays it in to them for collection, and they collect it for him. As shown before (*ante*, p. 179), such person is neither drawer nor holder, and has, under the Act, no more right to cross the cheque than any casual stranger who might find it lying about.

By whom
must be
crossed.

CHAP. XVII.

Is the instrument "a cheque crossed generally or specially" to that banker within the section so as to entitle the banker to protection? Arguments on both sides will be found under the heading "Crossed Cheques" (*ante*, pp. 256-272). In the case of the collecting banker, however, there is the additional feature that he is under practical compulsion to receive the cheque for collection from his customer, and in that sense is within the purview of the section. The contentions on either side seem fairly balanced, and it is difficult to forecast what view a Court might take if the question ever arose; either construction involving some straining of the crossed cheques section. Very possibly the contingency was not present to the minds of the Legislature, and is therefore not provided for.

Clause 6.—"The customer has no title or a defective title thereto"

The case in which the banker is protected under sect. 82 is therein defined as being where "the customer has no title or a defective title" to the cheque. There are allusions or hints in the judgments of Lord Halsbury and Lord Brampton in *Great Western Railway v. London and County Bank*, [1901] A.C. 414, which might be taken to imply that the position of a *bonâ fide* holder for value of a cheque, or even of the banker who collected it for a customer, might be affected by the question whether the fraud by which the cheque was obtained amounted to larceny by a trick, which is a felony, or was merely an obtaining by false pretences, which is a misdemeanour. The suggestions are too vague to admit of detailed criticism, but there appears to be really no basis for any such proposition.

A man who has stolen a cheque can give a perfectly good title to another, who takes it as a holder in due course. (*Lloyd v. Howard*, 15 Q. B., at p. 997.) The Larceny Act, 1916, sect. 45, exempts negotiable instruments in the hands of a *bonâ fide* holder for value from revesting

in the original owner even after conviction of the offender, an exemption which has been judicially interpreted as affording complete protection to such holder (see *Chichester v. Hill*, 52 L. J. Q. B. 160). Cheques are not "goods" within sect. 62 of the Sale of Goods Act, 1893, and so are exempt from sect. 24, sub-sect. 1 of that Act. It would be strange if civil trials on a bill or cheque were liable to be complicated by incidental criminal proceedings to determine, in the absence of the alleged criminal, whether his conduct amounted to felony or misdemeanour. In *Clutton v. Attenborough*, [1897] A. C. 90, there was actual theft, coupled with fraud which might well have been classed as larceny by a trick; yet the House of Lords unhesitatingly decided in favour of the holder in due course.

If the cheque is crossed "Not negotiable," it can make no difference whether the infirmity of title arises through felony, misdemeanour, or some disabling circumstance not amounting to crime. In other cases, the only question which can be raised against the holder in due course is, was the document knowingly issued as a negotiable instrument? (*Carlisle and Cumberland Bank v. Bragg*, [1911] 1 K. B. 489.)

The position is, if possible, stronger in the case of the collecting banker. The customer cannot have less than no title, even if he has obtained the cheque by larceny; and against the total absence of title sect. 82 affords protection.

Clause 7.—"Any liability"

The operative words of sect. 82 are "the banker shall not incur any liability to the true owner by reason only of having received such payment."

Any liability. This covers all forms of action which the true owner might otherwise have brought, conversion, money had and received, or anything else. The protection is not cut down by the words "by reason only

CHAP. XVII. of having received such payment," but extends to "every step taken in the ordinary course of business and intended to lead up to that result." (Per Lord Macnaghten, *Gordon Case*, [1903] A. C., at p. 244.) See also *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, and *ante*, p. 292. Indeed, the scope of the protection should be expressed by a still broader formula as "extending to every act which would be in the ordinary course of business if everything was in order." Where forged indorsement intervenes, nothing that is afterwards done with the cheque is "in the ordinary course of business." For instance, the conversion of a general crossing into a special one by the collecting banker can only be justified on the ground of his being a holder under sect. 77 (3) (*Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465), which, in case of forged indorsement, he is not; yet the protection was accorded in that case in like circumstances, and it would be unreasonable to withhold it on any such ground. In the *Gordon Case* itself, there were forged indorsements; which goes to show that Lord Macnaghten contemplated their intervention.

Clause 8.—"To the true owner"

As to who is true owner, see *ante*, p. 259. The true owner being the only person entitled to or interested in the cheque and its proceeds, protection against him secures complete immunity to the banker.

Clause 9.—"By reason only of having received such payment"

As to the extension of the protection to all such steps as would have been in the ordinary course of business, leading up to the receipt of payment, had everything been in order, see above. By the combined or alternative effect of sects. 82, 80, and 60, a banker is protected who collects for one customer a crossed cheque drawn by another customer.

Apart from sect. 82, protection to the collecting banker is very limited in the case of cheques. He may escape liability if he can show that the proceeds have reached the true owner or been applied for his benefit. (*Bevan v. National Bank*, 23 T. L. R. 65 ; cf. *Reid v. Rigby*, [1894] 2 Q. B. 40 ; cf. *Reversion Fund and Insurance Co. v. Maison Cosway*, [1913] 1 K. B. 364.)

CHAP. XVII.

 Protection
 apart from
 sect. 82.

In *Souchette v. London County and Westminster Bank*, 36 Times L. R., a fraudulent employee obtained from his company cheques payable to creditors of the company for larger amounts than were due, forged the indorsements, and paid them into his private account, discharging the actual debts by his own cheque on the collecting bankers. The latter were only held liable for the difference.

As to cheques to which the customer has a revocable title, collected prior to repudiation, see *ante*, void and voidable instruments.

Collecting Bills

There is no statutory protection whatever for the banker with regard to the collection of bills proper. It has been suggested that a bill drawn by a customer on his banker payable at a future date might be crossed under sect. 17 of the Revenue Act, 1883, and that in such case the collecting banker would be protected. It is true that that section is not, in terms, confined to documents payable on demand, but it is obviously intended to deal with instruments of lower commercial standing than bills or cheques, and the restriction of payment to the specified payee, the negation of negotiability, and the absence of any relativity of obligation and risk render it quite inapplicable to bills after date, even if drawn by customer on banker.

As an agent, however, the banker collecting bills for a customer is entitled to all the rights of and consideration due to a mandatory against and from his mandant, as

CHAP. XVII. defined in the *Macmillan Case*, [1918] A. C. 777, so far as that is relevant. Unless himself in fault, he can claim indemnity from his customer and can debit him with a dishonoured bill or with any amount for which he has been found liable to a true owner. He is not liable for acting reasonably, though mistakenly, on ambiguous instructions. The principal must save him harmless from any loss into which he has led him by word, deed, or silence.

How to be collected

The banker is bound to present the bills for acceptance and payment in accordance with the provisions of the Bills of Exchange Act, and must give notice of dishonour to the customer or the persons liable on the bill. (Bills of Exchange Act, 1882, s. 49 (13); *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526; *Bank of Scotland v. Dominion Bank*, [1891] A. C. 592.) If the banker employ a sub-agent for the purpose of collecting bills, he is responsible to the customer for negligence on the part of such sub-agent. (*Mackersy v. Ramsays*, 9 C. & F. 818; *Prince v. Oriental Bank Corporation*, 3 A. C. 325.) The banker is further responsible to the customer for monies received by such sub-agent, apart from any question of account between banker and sub-agent. (*Mackersy v. Ramsays*, *ubi sup.*)

Agent for
remitting
banker.

But the banker receiving bills for collection from another banker is not agent for that banker's customer, but for the remitting banker; and, unless he has distinct notice that the bills are the property of the customer and are in the remitting banker's hands purely for collection, may treat them as that banker's property. (*Johnson v. Robarts*, L. R. 10 Ch. 505; *ex parte Armitstead*, 2 G. & J. 371.) On this basis they would be liable to the lien of the sub-agent for any balance due to him from the remitting banker. (*Ex parte Froggatt*, 3 Mont. D. & De G. 322; *Prince v. Oriental Bank Corporation*,

3 A. C., at p. 305 ; *ex parte Sargeant*, 1 Rose 153.) In CHAP. XVII.
Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank, [1904]
 2 K. B. 465, Bigham, J., with respect to cheques, uses
 expressions implying that, in his opinion, collection was
 a special purpose inconsistent with lien, but this is
 clearly not the case. (Cf. *Currie v. Misa*, 1 A. C., at
 pp. 565, 569, 573 ; *Thompson v. Giles*, 2 B. & C. 421.)

The collecting banker equally has a lien on bills Lien against
customer.
 handed him for collection, for any amount due from the
 customer at the time of receiving the bills or during
 their currency. (*Giles v. Perkins*, 9 East 12 ; *ex parte*
Schofield, 12 Ch. D. 337 ; *Dawson v. Isle*, [1906] 1 Ch.
 633.) If the customer has indorsed the bill, the banker
 has a remedy against him to the extent of such indebted-
 ness. (*Giles v. Perkins*, *ubi sup.*, at p. 14.) Mere indorse-
 ment for collection, without indebtedness on the part
 of the customer, of course gives no remedy on the bill
 against the customer in case of dishonour, there being
 no consideration. (*Ex parte Schofield*, *ubi sup.*, at p. 343.)
 The banker's course is to debit the customer with the re-
 turned bill. If the account will not stand this, the amount
 should be treated as an overdraft or as money which
 the customer is bound to repay to the banker as his
 agent.

In the absence of any protection analogous to that Collection or
transfer.
 of sect. 82, the question whether a banker has taken
 a bill for collection, subject to his lien, or as transferee
 for value, has never had the same importance as in
 the case of cheques. It would seem to depend on the
 nature of the dealing between the banker and customer.

Mere indorsement by payee of an order bill or by an
 indorsee of one specially indorsed is, of course, no test, as
 that is necessary for collection. Even an unnecessary
 indorsement by the customer may be only for extra
 security in case the lien has to be exercised. (*Ex parte*
Schofield, *ubi sup.* ; *ex parte Barkworth*, 2 De G. & J. 194.)

CHAP. XVII.

Entering as
cash.

Entering as cash before receipt of payment has been held evidence of the banker's having taken the bill in his own right (*Giles v. Perkins*, 9 East, 12; *Thompson v. Giles*, 2 B. & C. 422; *ex parte Barkworth*, *ubi sup.*; cf. *Dawson v. Isle*, [1906] 1 Ch. 633), and as constituting an undertaking by the banker to honour cheques to the amount of the bills. (*Thompson v. Giles*, *ubi sup.*, at pp. 429, 431; cf. *In re Mills Bawtree & Co.*, 10 Morrell's Bankruptcy Cases, 193.) In the latter case, Vaughan Williams, J., recognised the authority of *Thompson v. Giles*, but said it had never been applied to an instrument payable on demand. The principle was so applied in the *Gordon Case*, and much of the judgments in that case appears equally applicable to bills payable after date. If crediting as cash operates as a transfer of a current bill, the Bills of Exchange (Crossed Cheques) Act, 1906, has, of course, no bearing on the matter.

Collection of Cheques

Presentation
of cheques.

Cheques paid in for collection must be presented with diligence. When the cheque is drawn on a bank in the same place, the banker should present it the day after he receives it. (*Rickford v. Ridge*, 2 Camp. 537; *Forman v. Bank of England*, 18 T. L. R. 339.) When the cheque is on a bank in another place, it is sufficient if the banker either present it or forward it on the day following receipt. (*Hare v. Henty*, 10 C. B. N. S. 65; *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Heywood v. Pickering*, L. R. 9 Q. B. 428.)

Such forwarding may be to another branch or to an agent of the bank, who has the same time for presentation after receipt. (*Prideaux v. Criddle*, *ubi sup.*) A non-clearing bank can thus use a clearing bank.

Employment
of banker.

Some expressions of Sir Mackenzie Chalmers' (Bills of Exchange), 8th edit., p. 288, seem to suggest a doubt whether the customer is entitled to the extension of time involved by collection through his banker, except where such collection is obviously necessary, as in the case of

crossed cheques. It is true that in *Alexander v. Burchfield*, 7 M. & G. 1061, the Court held that the recipient of a cheque was bound to present the day after receipt, either by himself or his banker. But that case was decided in 1842, on common law principles only. Under existing legislation the only limitation in the case of a bill payable on demand is that it shall be presented for payment within a reasonable time after issue in order to charge the drawer, or within a reasonable time after indorsement to charge the indorser. Cheques differ from other bills on demand with regard to the liability of the drawer; but in any event the only requisite is that the cheque shall be presented within reasonable time.

Sects. 45 and 74 of the Bills of Exchange Act import the custom of trade and the custom of bankers as elements in the calculation of what is reasonable time for the presentation of a cheque.

Sect. 49, sub-sect. 13, as to bills in the hands of an agent when dishonoured, is applicable to cheques, and seems to recognise the intervention of a banker. Of course, as to crossed cheques, the thing is beyond dispute. And it would be impossible to contend now-a-days that presentation through a banker, even of an uncrossed cheque on a banker in the same town, was not a reasonable method of presentation, or that the delay thereby occasioned precluded the presentation from being within reasonable time, as reckoned by the custom of trade and bankers. The idea of business firms or even individuals collecting their own cheques is, under modern conditions, absolutely inconceivable.

Anyway the question does not immediately concern the banker, who has only to present within the limits above specified in order to discharge his duty to his customer.

Where a banker employs another agent, he is responsible to the customer for default on the part of that agent. (*Mackersy v. Ramsays*, 9 C. & F. 818.)

Default of
sub-agent.

CHAP. XVII.

Presentment through a recognised clearing house is equivalent to presentment to the drawee bank. (*Reynolds v. Chettle*, 2 Camp. 596.)

Presentment by Post

Presentment by one bank to another by post is sufficient. (*Prideaux v. Criddle*, L. R. 4 Q. B., at p. 461.) In such case it would seem that the paying bank receives the cheque as agent for presentation to itself (*Bailey v. Bodenham*, 16 C. B. N. S., at p. 296), and so can hold it till the day after receipt. (See opinion of Mr. Cohen and Sir Mackenzie Chalmers, "Questions on Banking Practice," 7th edit., Question 386.) If not paid, it must be returned the day after receipt; the drawee bank cannot claim two days, one for presentment to itself, the other as an agent holding a dishonoured bill. When a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it is presented for payment or paid in for collection. If the latter, the bank has the usual time of an agent for returning it and giving notice of dishonour. (*Boyd v. Emerson*, 2 A. & E. 184.) If accepted for collection, the bank must pay such cheque in preference to a debt due to itself from the drawing customer. (*Kirby v. Williams*, 5 B. & Ald. 815.) If, for instance, the drawer's account was overdrawn when the cheque was paid in, but, before it was returned, the drawer paid in sufficient funds to cover it, not appropriated to other payments, the bank would have to pay the cheque, irrespective of their lien for the overdraft.

As between
two
customers.

By stranger.

A cheque sent by post by a private individual to the drawee bank with request for a remittance by post would in practice be returned at once unpaid. The bank are obviously not bound to undertake the office of collecting agent; while, as paying bank, presentment by post is only sufficient where authorised by agreement or usage,

CHAP. XVII.

and the usage of bankers does not authorise presentment by post except by a bank. In any case the duty of a bank receiving by post a cheque drawn on it for payment only is, if it is not going to pay the cheque, to post it back the same day. Where the rules of the country clearing apply, that is, where a cheque is presented to a country bank through the London Clearing House, the time allowed is very limited. The cheque must be returned by the first post after receipt, and direct to the country or branch bank, whose name and address are across it. Rule 4 is as follows: "Any country bank not intending to pay a cheque sent to it for collection, to return it direct to the country or branch bank, if any, whose name and address is across it." The words "for collection" as used here, though justified by banking phraseology, are somewhat misleading, especially as they occur elsewhere in the rules in the ordinary sense. In this particular case they are equivalent to "for payment," the cheque necessarily reaching the country bank through its own London agent. If the drawee country bank does not return the cheque direct by the first post after receipt, it is held liable to pay the amount (*Parr's Bank v. Ashby*, 14 T. L. R. 563) if the presenting bank have acted on the presumption that it would be paid.

Return of
cheque un-
paid.

The rules of provincial clearing houses differ as to the time within which unpaid cheques must be returned.

If the banker fails to present the cheque within the allotted time after it reaches him, he is liable to his customer for loss arising from the delay. (*Lubbock v. Tribe*, 3 M. & W. 607.) The indorser may thus be discharged by the omission to present the cheque within a reasonable time after the indorsement. The drawer of a cheque is, however, in a different position in this respect from the drawer of an ordinary bill payable on demand. The provisions of sect. 45 are, in the case of cheques, modified by sect. 74; and the drawer, except in,

Liability for
delay.

CHAP. XVII. and to the extent of, damage sustained by failure of the drawee bank during delay in presentment, remains liable on the cheque unless and until released by the Statute of Limitations. This reduces the risk involved by delay, but it is the banker's duty not to subject his customer and incidentally himself to it. The banker is further liable to his customer for damage to credit if he dishonour a cheque which there would have been funds to meet if cheques paid in had been properly presented for payment. (*Forman v. Bank of England*, 18 T. L. R. 339.)

Duty to give notice of dishonour.

The collecting banker must give notice of dishonour with regard to any bills or cheques dishonoured on presentation by him.

On cheques.

So far as cheques are concerned, the need for notice of dishonour to the drawer is, as previously stated, somewhat of an anomaly, the drawer being the principal debtor on the instrument, and having no right of recourse against any other party. Still he is drawer within sect. 48, and as such entitled to notice, though in the majority of cases omission to give it would be excused under either (4) or (5) of sect. 50, sub-sect. (2) (c), the dishonour having arisen either from insufficient funds, in which case the banker is under no obligation to pay the cheque, or from countermand of payment by the drawer.

To whom to be given.

Under sect. 49, sub-sect. 13, where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. The latter would seem far the preferable course for the collecting banker. It is somewhat improbable that he should be acquainted with the addresses of the parties to the bill or cheque other than his own customer; there seems no reason why he should take upon himself the additional labour of notifying them of the dishonour; and if he gives notice, say to the last indorser only, he runs the risk of that indorser not passing it on, and of the other parties being conse-

quently discharged. In such case he would be liable to his customer; as the alternative course to giving notice to the customer, allowed by the section, is that of giving notice to the parties liable on the bill, a duty which is not fulfilled by giving notice to some or one of them.

The time allowances for giving notice, where a bill or cheque is in the hands of a bank for collection, are on a fairly liberal scale. By sect. 49, sub-sect. 13, the banker has the same time to give notice to his customer as if he (the banker) were the holder, and the customer, upon receipt of such notice, has himself the same time for giving notice as if the banker had been an independent holder. Moreover, where the instrument has been forwarded by one branch to another, or a branch to the head office, or *vice versâ*, for collection, each such constituent of the entire bank is, for the purpose of giving notice of dishonour, regarded as a separate entity, and the same time allowed as if they were independent holders. (*Clode v. Bayley*, 12 M. & W. 51; *Prince v. Oriental Bank Corporation*, 3 A. C., at p. 332; *Fielding v. Corry*, [1898] 1 Q. B. 268.)

When to
be given.

As to the method of giving notice of dishonour, sect. 49, sub-sect. 6, enacts that, "the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour." Sir Mackenzie Chalmers' note is, "This sub-section approves a common practice of collecting bankers which was previously of doubtful validity."

How to be
given.

The usual and natural practice of collecting bankers would seem, however, to be to return the bill or cheque to their own customer; and the sub-section does not appear very aptly framed for a complete authorisation of this practice. It does not cover the case of a bill or cheque payable, or by means of blank indorsement become payable, to bearer, of which the customer is the holder; and therefore the return of such a document to

Returning
bill to
customer.

CHAP. XVII.

the customer is not notice of dishonour within the sub-section, which only applies where the customer is either drawer or indorser. Presumably indorsement for collection would be sufficient to constitute the customer an indorser within the provisions both of this sub-sect. and of sect. 49, sub-sect. 13.

The words “*return of a dishonoured bill*” seem to point to the sub-section being confined to the bill or cheque being restored to the source whence it came; in the banker’s case, to the customer. It might be doubted whether the mere transmission of the bill to a prior party, not the holder’s immediate transferor, would be within these terms.

In any event such a course would be an undesirable one for the banker to adopt. There seems no reason why he should put the bill or cheque out of the possession of himself or his customer, the position of holder being essential if proceedings have to be taken on it. (*Lloyds Bank v. Dolphin*, Court of Appeal, Times newspaper, Dec. 2, 1920.)

Method of
communication.

Save in the exceptional case of the return of the bill to a drawer or indorser, the notice must be given in writing or by personal communication (sect. 49, sub-sect. 5). It may be sent by post. Sect. 49, sub-sect. 12 (b) clearly recognises this.

Notice by
telegram.

Notice by telegram would seem to be good. Willes, J., appears to have doubted as to this in *Godwin v. Francis*, L. R. 5 C. P., at p. 303; but in *Fielding v. Corry*, [1898] 1 Q. B. 268, A. L. Smith, M.R., expressed the opinion that such notice was sufficient.

When must
be given.

It is, however, to be noticed that, except in the case of personal communication, the crucial time is the sending, not the receipt, of the notice (sect. 49, sub-sect. 12). Thus, where the parties reside in different places, the notice must be sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that

day, and if there be no such post on that day, then by the next post thereafter. CHAP. XVII.

In *Fielding v. Corry*, *ubi sup.*, there being convenient posts on the day following dishonour, a telegram sent the next day, though it arrived about the same time as a letter posted the previous day would have done, was held to be too late. Had a special messenger been despatched at any time during the day after dishonour, though he might have been far later in arriving, that would presumably have sufficed.

In that particular case notice of dishonour was posted by mistake to the wrong branch, and the telegram was sent to the right branch. It was held that this was equivalent to a redirection of the letter, and that the notice was good; but the decision seems open to criticism.

No case has yet arisen as to the validity of notice by telephone. It might fairly be considered to come under the head of a personal communication, the actual voice being transmitted by the reciprocal vibrations of the discs induced by the current in the same way as by vibration of the air or intervening material in the case of ordinary speaking. Whether by telephone good.

As before stated, the banker is entitled, presumably by the custom of bankers, to debit the customer's account with any cheque returned unpaid, whether the customer has indorsed it or not, and whether the banker has credited it as cash or not. (*Capital and Counties Bank v. Gordon*, [1903] A. C., at p. 248, *per* Lord Lindley.) Debiting returned cheques.

CHAPTER XVIII

THE PASS BOOK

THE present position of the pass book is most unsatisfactory. Its proper function is to constitute a conclusive, unquestionable, record of the transactions between banker and customer, and it should be recognised as such. After full opportunity of examination on the part of the customer, all entries, at least to his debit, ought to be final and not liable to be subsequently re-opened, at any rate to the detriment of the banker.

It would be dangerous, however, to assume that such is the present effect of the pass book.

Decisions as
to pass book.

In *Devaynes v. Noble*, 1 Merivale, 530, 535, in 1816, the Court of Chancery directed an inquiry into the nature and effect of the pass book, and the report of the master is set out at length in the case.

Therein it is stated that, on delivery of the pass book to the customer, he “ examines it, and if there appears any error or omission, brings or sends it back to be rectified ; or, if not, his silence is regarded as an admission that the entries are correct.

That finding was recognised and adopted by the Court, *ubi sup.*, at p. 610.

In *Skyring v. Greenwood*, 4 B. & C. 281, decided in 1825, a firm of bankers credited a military customer with certain sums of money to which they supposed him to be entitled, but to which he was not really entitled, and which were never received by the bankers, who had, moreover, been officially informed of their mistake. They so credited him for five years, and communicated the

credit to him by statements of account analogous to a pass book. On discovery of their error, they sought to retain, from subsequent monies coming to their hands for his credit, an amount equivalent to that credited by mistake, which the customer had drawn out. It was held that they were not entitled to do this, the entries to credit being a representation that the money had been received for the customer's use, and the customer having, in reliance thereon, altered his position by spending more than he would otherwise have done. This case goes to show that a credit entry may be regarded as a representation binding the bank, if the customer can show he has altered his position in reliance thereon. It was cited and approved by Mathew, J., in *Deutsche Bank v. Beriro*, 73 L. T. R. 669; 1 Com. Ca. 255, by Mathew and A. L. Smith, JJ., in *R. v. Blenkinsop*, [1892] 1 Q. B. 43, and by Lush, J., in *Holt & Co. v. Markham* (Times newspaper, August 1st, 1922). In *Holland v. Manchester and Liverpool Bank*, 25 Times L. R. 386, Lord Alverstone, C.J., said that the Court had the right to have the entry subsequently corrected, but not to dishonour cheques drawn on the faith of it, so long as it remained uncorrected, and awarded damages for dishonour of such cheques. The two conclusions seem incompatible and the former is probably erroneous.

In the absence of any change of position, a mistaken credit entry may, probably, be rectified within reasonable time. In *Commercial Bank of Scotland v. Rhind*, 3 Macq. H. of L. 643, Lord Campbell, L.C., said: "It would indeed be a reproach to the law of Scotland, if, there being satisfactory evidence that, by the mistake of a clerk, there had been in the pass book a double entry of the same sum to the credit of the respondent, the mistake could in no way be shown by the bank, and if he were entitled fraudulently to extort from them £80 beyond the amount of what is justly due to him." And the reverse case must hold

CHAP. XVIII.

Rectification
of errors.

CHAP. XVIII. good. No amount of acquiescence on the part of the customer could justify a bank in withholding from him money really received for his credit, but omitted in the credit items of the pass book. The credit items are peculiarly within the knowledge and control of the banker, the debits within that of the customer. In *Commercial Bank of Scotland v. Rhind*, Lord Campbell seems to imply that the bearing of the pass book may almost be divided in this way, that the items to the customer's credit bind the banker, those to his debit the customer. He says : " On proof of the pass book having been in the custody of the customer, and returned by him to the bankers without objection being made to any of the entries by which the bankers are credited, such entries may be *primâ facie* evidence for the bankers as those on the other side are *primâ facie* evidence against them."

In the same case the Chancellor said, at p. 651, " These entries in the pass book, whether on the debtor or creditor side, are merely items in an account current afterwards to be examined, adjusted and ' fitted.' According to the mode of operating proposed, the customer might take a pair of scissors, and, cutting off all the items in which the bankers take credit for payments, give in evidence the other side of the account, and so make a *primâ facie* case against the bankers to recover the full amount of all his payments into their hands."

In that case it was the customer's own contention that the whole pass book, or, at any rate, the items since the last making up, which items included the double entry in question, constituted only a current account ; and the House appear to have utilised this contention for rejecting his somewhat preposterous claim. They presumably did not mean to imply that the pass book, however many times it has been in the customer's hands in the interval between periodical making up of accounts, remains throughout that period a mere account current.

Anyway, other, some of them later, cases tend to establish it as a stated or settled account, not only after a yearly or half-yearly balance has been struck, but on each occasion when it is had out with the balance, debtor or creditor, pencilled in, and returned by the customer without comment or objection. Unless it can be elevated to that position, it affords little protection to the banker. In *Shaw v. Dartnall*, 6 B. & C. 56, agents, in a position similar to that of bankers, had furnished to the defendant a pass book containing entries of annuities purchased by and payable to him. The defendant had been debited therein with £100 as returned in respect of an annuity to the Duke of Marlborough. The Court said: "As to the sum of £100, in respect of the Duke of Marlborough's annuity, I think that the defendant would be entitled to retain that sum, unless there was evidence of his assent to its being replaced to his debit. The entry is 'half a year's annuity, due the 10th of July, returned £100.' The evidence of his assent to that entry is this, that on the 13th of November, 1818, the account is made up, and a balance of £218 15s. 9d. struck. In March, 1819, another account is made up and a balance struck, and the sum of £100 continuing debited to him. I do not rely upon the ultimate balance struck on the 21st of May, 1820, because there was no distinct evidence of the defendant's assent generally to the whole contents of the entry of that date. But, on the ground that there was a previous assent by him when the two settlements of accounts took place, I am of opinion that that sum was properly placed to his debit, and must be allowed." (Cf. *Woods v. Thiedemann*, 1 H. & C., at p. 492, *per* Martin, B.) In *Blackburn Building Society v. Cunliffe Brooks & Co.*, 22 Ch. D., at pp. 71, 72, in the Court of Appeal, Lord Selborne, delivering the judgment of the Court, said: "Nor can they (the bankers) have the benefit of the doctrine that a pass book passing to and fro is evidence

CHAP. XVIII. of a stated and settled account ; because, if the directors of this society could not borrow money, they could not ratify an illegal borrowing simply by returning a pass book." The doctrine of the pass book being a stated and settled account is here treated as acknowledged and unquestionable.

Vagliano's
case.

Vagliano's Case, 23 Q. B. D. 243 ; [1891] A. C. 107, is probably the most favourable of the English cases to the banker's side of the question, especially as it indicates the means by which bankers may establish and fortify their position, and neutralise the effect of the adverse decisions to be presently referred to, notably *Chatterton v. London and County Bank*. In *Vagliano's Case*, in the Court of Appeal, 23 Q. B. D., at p. 245, it was contended as follows : " The plaintiff received his pass book half-yearly, containing entries debiting the payments made for him, for which the paid bills were sent as vouchers ; these bills were retained by the plaintiff and the pass books returned by him without objection. This amounted to a settlement of account, which cannot now be reopened, especially considering the negligence of the plaintiff with regard to the examination of these vouchers." In the judgment of the five concurring Lords Justices, they say (at p. 263) with regard to this contention : " There is another point to be considered. The plaintiff from time to time received from the bank his pass book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned, without objection, the pass books. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from the settlement of account. But there was no evidence to show what, as between a customer and his banker, is the

implied contract as to the settlement of account by such a dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of duty to the bank or negligence on his part."

It is true that the decision of the Court of Appeal was reversed by the House of Lords, [1891] A. C. 107, but it was so on grounds not affecting this part of the judgment. This is admitted by Bray, J., in *Kepitigalla Rubber Estates Co. v. National Bank of India*, [1909] 2 K. B. 1010. There are, indeed, passages in the judgments in the House of Lords which recognise, as a matter of law and common sense, that the pass book must have some effect, and the customer some duty and obligation with regard to it and returned cheques and bills.

Lord Halsbury, in enumerating the circumstances which influenced the bank, says (p. 115): "The false documents were paid, duly debited to the customer, and duly entered in his pass book, and, so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills returned." Again, he says (p. 116): "Was not the customer bound to know the contents of his own pass book?" Lord Selborne (at p. 128) speaks of the dealings with the pass book as calculated to disarm suspicion on the part of the bank.

The main value of the judgment of the Court of Appeal is the intimation that the effect of the pass book, and the duty of the customer with regard to it and the returned cheques and bills, are matters of evidence showing what is the implied contract between banker and customer, based on the custom of bankers. For their own protection, bankers should co-operate to formulate such custom, establishing the status of the pass

As matter
of evidence.

CHAP. XVIII. book as a settled account, and affirming the duty of the customer to examine and compare it with the returned cheques and bills, and notify the bank of any errors therein appearing. It really seems little more than recognising and consolidating what one would have said was the common understanding on the subject; and it would be matter for sincere regret if the evidence suggested by the Court of Appeal were not forthcoming on a future occasion.

The decision further recognises the principle that if the pass book be regarded as a settled account, and there be a duty on the part of the customer with regard to it and the returned documents, the omission of that duty will constitute negligence, sufficient to estop the customer from re-opening the account to the detriment of the bank.

Present
state of the
question.

In the meantime, and until evidence of the nature suggested by the Court of Appeal is forthcoming, but little reliance can be placed on the pass book as precluding a customer from disputing debits which have appeared in the book both when delivered to him and returned by him without objection, or from denying the genuineness of his signature to cheques which represent such debits, and have been returned paid with the book and retained by the customer without comment.

If the case of *Chatterton v. London and County Bank* is to be accepted as laying down the law on the subject, it is difficult to see what is the object of the pass book from the banker's point of view, seeing that its effect is therein reduced to a minimum, and any duty on the part of the customer expressly negatived.

That case, in all its stages, is fully reported in *The Miller* newspaper, and there only.

The plaintiff banked with the defendant bank. Between September, 1887, and August, 1888, cheques were presented to the defendants, and paid, purporting to

have been drawn by the plaintiff's authority and signed by him. The plaintiff called, or sent, for his pass book every week, and it was given to him made up to date, with the cheques paid in the interval in the pocket. He usually compared the entries in the pass book with the bank account in his ledger, and ticked off the items in the former before returning it to the bank.

In or about August, 1888, the plaintiff discovered that to twenty-five of these cheques his signature as drawer had been forged, and he claimed to have the amount of them replaced to his credit at the defendant bank. At the first trial, the jury found (1) the cheques were not forged; (2) the plaintiff's conduct contributed to the loss. (*The Miller*, May 5th, 1890, p. 100.) Judgment was therefore entered for the bank. A divisional Court granted a new trial. (*The Miller*, July 7th, 1890, p. 177; *The Times*, June 27th, 1890, p. 3.)

There is nothing of particular importance in the Divisional Court proceedings, the new trial being granted mainly on the ground that the trial below was unsatisfactory. The bank appealed. The Court of Appeal dismissed the appeal. (*The Miller*, November 3rd, 1890, p. 394, where the proceedings are reported *verbatim*.) Counsel for the bank said that the plaintiff usually in person took the paid cheques and the pass book away from the bank, and his ticking off the items authorised the bank to go on paying, admitted to the bank that the signatures were his. Lord Esher, M.R., expressed dissent and said: "It is a hundred to one that they never looked at the pass book. Why should they look to see whether or no he made ticks against the cheques?"

It is to be noticed that the main contention on behalf of the bank in this case was that, by recognising the payment of past forged cheques, the plaintiff authorised or induced the bank to pay the subsequent forged cheques. That contention does not seem a strong one.

CHAP. XVIII. The bank pay each specific cheque because they believe the signature to be genuine, and preceding transactions have little or nothing to do with succeeding ones. It has been held that even the conscious payment of a bill to which the payer's signature has been forged does not estop him from setting up that a subsequent bill is forged by the same hand, unless a course of business is established amounting to authority to use the name. (*Morris v. Bethell*, L. R. 5 C. P. 47.) The stronger line, that of settled account, which the customer is, by his negligence and the resultant damage to the bank, estopped from reopening, does not seem to have been put forward, at any rate prominently.

Lord Esher's
views.

But the subsequent remarks of Lord Esher militate quite as much against this contention. If there is no duty on the part of the customer to examine and compare the pass book and paid documents, there can be no negligence in his not doing so, and so no ground of estoppel could arise, even admitting the pass book to constitute a settled account. The following is the material part of the argument. Counsel for the bank said he relied on the plaintiff's receipt of the cheques week by week, and his ticking the pass book opposite the bank's payments, as indicating that things were correct. Lord Esher: "Suppose he never looked at the pass book?" Lopes, L.J.: "What is the object of the book?" Counsel: "That he may examine it and see the state of his account." Lord Esher: "That may be. But supposing he does not do what he has a right not to do, how can that be relied on?" Counsel: "The plaintiff might have been entitled to say, 'I decline to give you any assistance; if it is my signature, pay; if not, you will not be authorised in paying.' But if he does not take up a merely negative position; if he says to the bank, either by language or conduct, 'That is my signature—'" Lord Esher, interrupting: "Is everybody

at liberty to send for his bank book week by week ? ”

Counsel : “ Yes ; and, in the ordinary course of business, he does this in order to see that it is right.”

Lord Esher : “ I do not know that he does.” Counsel : “ In any event, the point is a matter for the jury.”

Lord Esher : “ But you must not put a burden on people the law never placed on them ; you are putting on them the burden of saying, ‘ Look through the pass book.’ ”

Lopes, L.J. : “ I cannot help thinking the pass book is sent for the purpose of examining it.”

Lord Esher : “ But he is not bound to look at it.”

Counsel : “ If he sends for it week by week, the bank are reasonably justified in coming to the conclusion that it is examined, and that they are checked in their payments.”

Lord Esher : “ I do not know that they are. That is putting a burden on the bank [*sic* in *The Miller* report, but clearly must be, as before, ‘ on people,’ or ‘ on the customer ’], which you have no right to do, and which would interfere with business all over the country. If the mere fact is to give the bank any right at all, we are putting a burden on the customer, which I feel very much disinclined to do.”

Counsel : “ He goes for it himself.”

Lord Esher : “ But has the bank a right to infer anything from it ? A hundred things may happen to prevent him from looking into it when he has got it, and what right has the bank to infer that he has looked into it ? ”

No formal judgment was given, the appeal being simply dismissed.

On the new trial (*The Times*, January 21st, 1891 ; *New trial. The Miller*, February 2nd, 1891), Mr. Justice Mathew, in summing up to the jury, told them that the questions were, whether the cheques were forgeries and whether the bank were misled by the plaintiff’s conduct, and had the plaintiff, by his conduct, disentitled himself to recover from the bank. He said there was no contract between the bank and the customer with regard to the

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pass book. If the bank had proved they were misled, and they had not done so, could it be said that the plaintiff had done anything wrong because he conducted his business in his own way? People in business were not always guarding against fraud, but against mistakes. Supposing the plaintiff had told the clerk, who, it was suggested, had forged the cheques, to examine the pass book and compare the returned cheques with it and the counterfoils, would the bank have any right to complain? And yet, in that case, the frauds would not have been discovered any sooner in the ordinary course of events.

The jury found all the questions in favour of the plaintiff, and judgment was given against the bank.

Here, again, the settled account aspect of the pass book does not seem to have been put forward, but the remarks of Mathew, J., like those of Lord Esher, would be equally fatal to any contention based on that ground.

Right of delegation.

The point introduced by Mathew, J., as to the right of the customer to absolutely delegate all examination of the book and returned documents to another, thereby escaping all liability, is no doubt productive of some difficulty. A certain amount of delegation is essential in business; and, in ordinary cases, a man is perhaps not expected to anticipate fraud and forgery on the part of those he has no reason to suspect. Recognition of the right to delegate the examination to a subordinate, free from any supervision, is, however, so destructive of any protection to the banker that the more reasonable view would seem to be that it is part of the customer's duty to his banker not to leave this matter to the uncontrolled management even of a confidential clerk. There is such a thing as negligence by unreasonable trust. (See *per Erle, C.J.*, in *ex parte Swan*, 7 C. B. N. S., at p. 436.)

"I am of opinion that by putting as much as they

did within his power they took the risk of failure in the discharge of their duty to the bank of which they were customers." Lord Haldane in *London Joint Stock Bank v. Macmillan*, [1918] A. C., at p. 821.

And there are *dicta* to the effect that such absolute delegation by a customer does not enable him to plead entire ignorance of the state of his banking account. (*Jacobs v. Morris*, [1902] 1 Ch., at p. 831.)

In formulating the custom and evidence hereinbefore referred to, this matter should be borne in mind, and the customer's obligation defined as, either himself to examine the pass book and the returned articles, or, if he delegate the duty, to exercise such supervision over the person performing it as to render the combined operation equivalent to a personal investigation.

In *Kepitigala Rubber Estates Ltd. v. National Bank of India*, [1909] 2 K. B. 1010, the question of the pass book was again raised. Bray, J., referred to *Chatterton v. London and County Bank* as follows: "One of the cases referred to, *Chatterton v. London and County Bank*, appears only to be reported in *The Miller*. That is not, of course, an authorised report, but one cannot read it without being impressed by the fact that it must have correctly stated Lord Esher's language. At all events, the language used seems very good sense. The new trial of that case was reported in *The Times* as well as *The Miller*, and the observations of Mr. Justice Mathew are most pertinent, and, as it seems to me, most sound." And in concluding a long and careful judgment against the bank, the learned judge said, "Apart from authority, one has only to look at the facts of the case to see how absurd it would be to hold that the taking out of the pass book and its return constituted a settled account. It would mean this, that a secretary of a company by going to the bank for his own purposes in order to prevent the discovery of the fraud, and without knowledge on the part of any of the

CHAP. XVIII. directors, and getting the pass book (with a pencil entry in it of the balance), can bind the company for all purposes."

This decision of Bray, J., was approved and followed by Channell, J., in *Walker & another v. Manchester & District Banking Co.*, Journal of the Institute of Bankers, xxxiv. 413.

So, for the present, the matter stands in this country ; but it does not seem too much to hope that the larger recognition of the customer's duty to his banker, exemplified in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, and *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777, may some day be extended so as to include reasonable attention to the pass book and prompt notification of any items disputed.

American Decisions on the Pass Book

American decisions are far in advance of those of our own Courts with regard to the pass book.

Leather Manufacturers' Bank v. Morgan, in 1885, is a decision of the Supreme Court of the United States, reported 117 U. S. 96. In that case the amount of genuine cheques was fraudulently raised by a confidential clerk. The frauds covered about six months, during which the customer had back his pass book and paid cheques three times.

The customer made some examination of his cheque book and counterfoils, with a view to roughly checking his bank balance, but he does not seem to have, in any real sense, examined his pass book or the returned cheques ; and the clerk, by manipulating the addition of the counterfoils, a duty entrusted to him, evaded, for a time, discovery of the fraud. The customer admitted that if, on any of the three occasions, he had compared the pass book with the counterfoils, he must have discovered that his account had been charged with the

Leather
Manufacturers' Bank
v. Morgan.

raised cheques. The judge of first instance decided against the bank on the ground that the customer was under no duty whatever to the bank to examine his pass book and the vouchers returned with it, in order to ascertain whether his account was correctly kept. CHAP. XVIII.

The Supreme Court held that this view of the customer's obligation was not consistent with the relations of the parties or with principles of justice. They said that the sending of the pass book by the customer to be written up and returned with the vouchers is a demand on his part to know what the bank claims to be the state of his account; that the return of the book with the vouchers is the answer to that demand, and imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. The Court then quote the report to the English Court of Chancery in *Devaynes v. Noble* (1 Merivale, 530), and say that that report, made in 1816, is equally applicable now, both in England and America, and continue: "The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book." Later on the Court say: "Without impugning the general rule that an account rendered, which has become an account stated, is open to correction for mistake or fraud, other principles come into operation where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith by another for him; by reason of which negligence the

CHAP. XVIII. other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection, which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness." The Court further indicate another respect in which the position of the bank might be regarded as altered and prejudiced by the non-discovery and non-communication of the frauds. They say: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps by the arrest of the criminal or by an attachment of his property or other form of proceeding to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. . . . An inquiry as to the damages in money actually sustained by the bank, by reason of the neglect of the depositor to give notice of the forgeries, might be proper if this was an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defence it is that the depositor has, by his conduct, ratified or adopted the payment of the cheques, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it."

This view is strengthened by the fact that much the same consequences have affected English decisions as to

what alteration in the position of a bank would fix a customer with adoption of a forged cheque or bill, when, having knowledge thereof, he failed to communicate such knowledge to the bank. (*Ogilvie v. West Australian, &c., Co.*, [1896] A. C., at p. 270; *M'Kenzie v. British Linen Company*, 6 A. C. 82; *Ewing v. Dominion Bank*, [1904] A. C. 806.)

The same standard of alteration of position seems at least as applicable where it is sought to re-open a settled account.

The main point to be noticed up to this stage is the unqualified manner in which the Supreme Court of the United States affirm that duty of the customer with regard to the pass book which was denied by Lord Esher and other English judges.

Duty of customer recognised by American courts.

To the same effect is the judgment in *Critten v. Chemical National Bank of New York*, a decision of the Supreme Court of New York in 1902, reported 171 New York Reports, 219. The Court there say: "If the depositor has, by his negligence in failing to detect forgeries in his cheques and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default."

Critten v. Chemical National Bank.

They particularly dwell upon the duty of the customer to utilise his counterfoils, saying: "Considering that the only certain test of the genuineness of the paid cheques may be the record made by the depositor of the cheques he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record."

The duty of the customer with regard to the pass book is further emphasised by the Supreme Court of the United States in the *Leather Manufacturers' Bank Case*,

Constructive knowledge.

CHAP. XVIII. *ubi sup.* by the way in which they treat neglect on his part of the means of knowledge afforded by the pass book and the returned documents as equivalent to actual knowledge on his part, in order to fix him with adoption of the forged cheques.

After quoting Lord Campbell's decision in *Cairncross v. Lorimer*, 3 Macq., at p. 830, which enunciates the principle of adoption, but predicates full notice of the act which is adopted, they say: "This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered and infer previous authority to make the cheques, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that in reference to the account which he admits would have readily discovered the same fraud? It seems to the Court that the simple statement of this proposition suggests a negative answer."

In *Critten v. Chemical National Bank of New York (ubi sup.)*, the Supreme Court of New York say: "While we hold that this duty rests upon the depositor, we are not disposed to accept the doctrine asserted in some of the cases that by negligence in its discharge, or by failure to discover and notify the bank, the depositor either adopts the cheques as genuine or estops himself from asserting that they are forgeries."

The actual outcome of that case shows that this must only be read as discountenancing the idea that such adoption or estoppel is absolute despite the fact that the

particular loss was due to failure of duty on the part of the bank rather than on that of the customer. *Critten's Case* was decided on adoption ; two cheques were allowed the plaintiff because they were paid before he had his pass book and vouchers, and the clerk had been arrested and punished ; the next three were allowed the bank, on the ground that Critten ought to have discovered the forgery of the previous ones and warned the bank ; the sixth and subsequent ones were disallowed the bank, because the sixth was clumsily forged and should have put the bank on inquiry. Anyway, both Courts treat knowledge imputable from neglect as equivalent to actual knowledge. It is immaterial whether it is treated as ground for holding the account conclusive or the cheques adopted. CHAP. XVIII.

These two cases are still leading authorities in the United States. They were freely cited and approved in *Morgan v. United States Mortgage and Trust*, [1913] 208 New York Reports, 218 by the New York Court of Appeals, consisting of six judges. In this case, the Court say, "The depositor who sends his pass-book to be written up and receives it back with his paid cheques as vouchers is bound to examine the pass-book and vouchers and to report to the bank without unreasonable delay any errors which may be discovered," p. 228. And again, "Negligence in this case means the neglect to do those things dictated by ordinary business customs and prudence and fair dealing towards the bank which, if done, would have prevented the wrongdoing which resulted from the omission," p. 224.

As to wilful ignorance, the English authorities show symptoms of coming into line with the American. "Is not negligent ignorance as bad as knowledge," said Lord Blackburn (4 R. 9 A. C. 419). Lord Selborne in *M'Kenzie v. British Linen Bank*, 6 A. C., at p. 92, speaks of "reasonable ground to believe" as tantamount to knowledge. (Cf. *per* Lord Watson in *Scholfield v. Londesborough*, [1896]

CHAP. XVIII. A. C., at p. 543 ; *White v. Steadman*, [1913] 2 K. B. 348. See also *Jacobs v. Morris*, [1902] 1 Ch., at p. 831.)

The *Morison Case* was exceptional. The admissions of the plaintiff, his clemency to the culprit and financial arrangements with him, the fact that he employed independent auditors, who were not called at the trial ; all this deprives the case of value as a precedent. Still, the following passage from the judgment of Lord Reading, L.C.J., seems worth quoting in this connection : " As to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is the policy of an ostrich to know no more ; I am not sure that in this case we can altogether rely on the doctrine that for this purpose means of knowledge are not the same as knowledge " ([1914] 3 K. B., at p. 385.)

Delegation of Duty

Delegation
of duty of
customer.

The question of delegation is determined in favour of the banker by the American Courts in two of the above-mentioned cases. In the *Leather Manufacturers' Case*, the Supreme Court of the United States say : " Where the agent committed the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, without, at least, showing that he exercised reasonable diligence in supervising the conduct while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily on the principal cannot be deemed the equivalent of performance by the latter."

This seems a fair and reasonable view. If a man has a duty to perform, not absolutely necessitating its entire fulfilment by himself personally, he may delegate it to

another, but subject to its being satisfactorily and properly carried to a conclusion ; and for the accomplishment of this he remains ultimately responsible. The mere telling another to do a thing cannot be regarded as the equivalent of doing it. If the duty is to make reasonable examination of the pass book and returned documents, the labour may be divided by relegating the mechanical part to a subordinate, subject to efficient supervision on the part of the principal ; their united work being fairly considered as effective as the unaided efforts of the principal. Without such supervision this is obviously not the case. As before stated (p. 354), Lord Haldane in *London Joint Stock Bank v. Macmillan* said : " I am of opinion that by putting so much in his (a subordinate's) power they took the risk of failure in the discharge of their duty to the bank of which they were customers." This seems relevant to the present point.

In *Critten v. Chemical National Bank, ubi sup.*, the Court enunciated a very ingenious doctrine on this question of delegation.

They say : " Of course the knowledge of the forgeries which Davis (the fraudulent clerk to whom the duty of examination had been entrusted by the customer) possessed, from the fact that he was himself the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the cheques with the cheque book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they entrusted the examination to Davis instead of a third person, but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have discovered the frauds."

It may be doubtful whether an English Court would

CHAP. XVIII. adopt this idea of, so to speak, filtering the knowledge of the fraudulent subordinate ; it has at present no counterpart in English law. The simpler method seems to be to adhere to the principle of the pass book being a settled account, to insist on the duty of the customer to examine and compare it with the returned cheques and counterfoils, or to have that duty performed under effective supervision, and treat the omission of such duty as negligence or imputed knowledge, estopping the customer from re-opening the account if the bank were shown to have been prejudiced thereby ; such prejudice consisting in the deprivation of opportunity of self-protection or the loss of any remedy, civil or criminal, against the offender, it being immaterial whether the civil remedy would have been likely to produce satisfactory results or not.

Principle to
be adopted.

The difficulty in the way of establishing this position lies mainly in the *dicta* of Lord Esher and Mathew, J., in *Chatterton v. London and County Bank* and the judgments of Bray, J., and Channell, J., previously referred to. To overcome this, the banker must rely upon the expressions of the five Lords Justices in *Vagliano's Case*, supplemented by evidence of the nature specified in those expressions, and utilising, at least by way of argument, the conclusions of the American Courts of which those above mentioned are typical.

It must not be forgotten that if Lord Esher's view is correct, and there is no obligation whatever on the customer to look at his pass book, this would be fatal to the assumptions of acquiescence in course of business, charges for interest and commission, and the like, which have been hitherto deduced from the return, without comment, of the pass book in which such items figure. The judicial recognition of such deductions affords further ground for questioning the soundness of Lord Esher's views.

*Moral Duty*CHAP. XVIII.

Another consideration should be helpful in the matter. There is in recent law a tendency to enlarge the sphere of duty, breach of which may preclude a man from asserting his strict legal rights. Failure to fulfil a moral duty has been recognised as having this effect. In *M'Kenzie v. Linen Co.*, 6 A. C. 82, M'Kenzie was not a customer of the bank, though he is referred to as such in *Ogilvie v. West Australian &c.*, [1896] A. C., at p. 268. The duties attributed to him, therefore, were purely moral ones; but the House of Lords attached to the breach of them the same consequences as if they had been strictly legal duties. In *Ogilvie v. West Australian &c.*, the Judicial Committee refer to "the rules of fair dealing between man and man" as capable of imposing a duty from a customer to his banker. In *Ewing v. Dominion Bank*, [1904] A. C. 806, Ewing & Co., whose name was forged, were not customers of the bank, and the whole judgment of the Canadian Courts, practically affirmed by the Privy Council's refusal to give leave to appeal and the expressions used in so refusing, was based on the moral duty laid on a man who knows or has reasonable ground to believe his name has been forged to a negotiable instrument to give speedy notice to anyone likely to be injured thereby. (See Canada Supreme Courts Reports, vol. xxxv. 133; 7 Ontario L. R. 90.) It is surely not too much to contend that, with the materials ready to his hand, it is at least the moral duty of the customer to pay some heed to his banker's interests in this respect.

In *Brighton Empire Syndicate v. London and County Bank*, ante, p. 200, the bank were held liable for negligence in allowing the servant of the customer to make entries of sums and dates in the pass book and not checking such entries. That was an exceptional case, but it points to a duty with regard to the pass book on the part of the banker which ought to be reciprocal.

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In *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, a certain measure of effect was accorded to the pass book as a factor in neutralising negligence on the part of the collecting bank. See under "The Collecting Banker."

Degree of
care requir-
able from
customer.

As to the degree of care in examining the pass book and vouchers which may be reasonably expected from the customer, he clearly cannot be required to take such minute precautions as to exclude all possibility of forgery or fraud. He is not bound to resort to microscopical or chemical tests. In inspecting the pass book he would probably at once recognise the majority of the debits as representing cheques he recollected drawing, or periodical payments he had directed the banker to make; in case of an item he could not at once identify he should refer to the returned cheque, and if that failed to recall the transaction, to the counterfoil; if that, too, failed to suggest the occasion, he should examine the cheque narrowly, and if any suspicion remains, which he cannot satisfy by inquiry, he should communicate the matter to his banker.

This seems a rough outline of what a reasonable man would do if his own interests were involved, the test to be applied when the performance of a duty to another to take reasonable care is in question.

Estoppels do not bind the Crown; and it has been held in Canada that a Government Department cannot be held to have adopted debits by means of the pass book. See *R. v. Bank of Montreal*, 10 Ontario L. R. 117; 11 Ontario L. R. 595, where all the English cases as to estoppel against the Crown are cited.

CHAPTER XIX

FORGERIES

UNDER sect. 24 of the Bills of Exchange Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or give a discharge therefor, or enforce payment thereof against any party thereto, can be acquired through or under that signature.

The section is subject to the provisions of the Act, and also to exception in cases where the party against whom it is sought to retain or enforce payment of the bill is estopped from setting up the forgery or want of authority.

As shown by *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, this section does not apply to the illegitimate use of a signature authorised for a certain purpose; e.g., a "per pro." signature authorised for drawing but not for indorsement and payment into private account. A signature cannot be genuine for one purpose, a forgery when used for another. The same construction was there put on sect. 24 of the Forgery Act, 1861, which made the fraudulent affixing of a per pro. signature a forgery. See now Forgery Act, 1913, s. 1.

Nor does forged indorsement defeat the title of a person who, in a foreign country, has taken a bill or cheque with such indorsement, if by the law of that country an effective title was thereby acquired; at any rate not so as to render him or his transferee liable for

CHAP. XIX. conversion of the instrument. Whether a title to sue prior parties is conferred by such indorsement is an open question. (*Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677.)

Protection
of bankers
against
forgeries.

The provisions of the Act protecting bankers from the effects of this section are: Sect. 60, paying cheques on forged indorsement; sect. 80, paying crossed cheques in conformity with the crossing; and sect. 82, collecting crossed cheques for a customer; which are dealt with under the appropriate headings. As to banker's drafts, see *ante*, p. 151.

Main dangers.

The main dangers to which the paying banker is left exposed are the following:—

1. Forgery of his customer's signature as drawer of cheques.
2. Fraudulent alteration of the amount of cheques presented for payment.
3. Forged indorsement of bills accepted payable at his bank.

Apart from adoption or estoppel, there is no right in the banker to debit the customer with the amount of a cheque which he has paid, to which the drawer's signature is a forgery. The money has been paid without authority. It is not really a question of the banker's being bound to know his customer's signature or of whether he was negligent or not in not detecting the forgery, though both these grounds have been put forward and, more or less, judicially approved. The same principle applies to fraudulently raised cheques, if not to the whole amount, at any rate to the increase.

As to payment of domiciled bills on forged indorsement, the money has been paid to a person other than the one directly or indirectly designated by the customer, and so contrary to his mandate or authority.

A cheque to which the drawer's signature is forged is a mere piece of paper, not a cheque at all, unless it be

adopted by the drawer or become valid by estoppel as against an indorser. (See *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.)

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In each of the above cases, the banker's only chance of being able to charge the customer is where the conduct of the customer establishes an estoppel or amounts to adoption or ratification of the instrument.

In the last edition of this book, the treatment of forgeries was difficult and inconclusive, because, at that date, the decision of the Privy Council in *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559, was still, so far as such a decision can be, the ruling authority, and by it the duty of a customer to his banker, though its existence was grudgingly admitted, was degraded to a vague shadow, impossible of definition, ineffective for any practical purpose. Almost the only thing clear was that facilitation or invitation of forgery was no breach of that duty and that when advantage was taken of such facilities and loss ensued, that loss was not the direct or natural result of the customer's act or default, and must lie where it fell, namely, on the banker. Since then, the House of Lords, in *London and County Bank v. Macmillan and Arthur*, [1918] A. C. 777, have conclusively demonstrated the fallacies and misinterpretations of the Privy Council decision, declared it to be absolutely erroneous, and their judgments, supplemented by that of Atkin, L.J., in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, have fully vindicated the earlier authorities and established the duty of customer to banker on its legal and rational footing.

The Customer's Signature to a Cheque

Apart from adoption or ratification it is not easy to define where estoppel as to the actual forgery of the customer's signature to a cheque comes in, even on the present basis of the customer's duty. Mere carelessness

CHAP. XIX.

in keeping the cheque book is, of course, no use. In fact, it is generally adduced as the "reductio ad absurdum" of the contentions as to estoppel by negligence. (See, for instance, *per* Lord Halsbury, in *Scholfield v. Londesborough*, [1896] A. C., at p. 531; *Farquharson v. King*, [1902] A. C., at p. 336.)

The entrusting the occasional drawing of cheques to an agent, who subsequently draws others without authority, would come rather under the head of holding out than of estoppel by breach of duty.

The lack of supervision over an agent, who might have access to the cheque book and opportunities for concealing forgeries committed by him, is probably too remote in this connection (see *Vagliano's Case*, [1891] A. C., at p. 115; *Farquharson v. King*, [1902] A. C. 325). The theory of negligence by unreasonable trust in a subordinate, enunciated in *ex parte Swan*, 7 C. B. N. S., pp. 442, 447, is a stronger line, though, at present, more distinctly adopted in America than here. (See *ante*, p. 356 *sqq.*)

If it were shown that the customer had accredited the cheque to the bank, or actively misled the bank into paying it, in any of the ways exemplified in *Vagliano's Case*, that would no doubt establish an estoppel.

But though concrete examples may not readily suggest themselves, it is clear that negligence, disregard of ordinary precautions, of the reasonable protection of the banker against injury, even through forgery, may estop the customer from disputing payment of a cheque to which his signature has been forged as drawer. "The principle is a sound one, that where a customer's neglect of due precaution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." (*Per* Lord Cranworth, in *Orr v. Union Bank of Scotland*, 1 Macq. H. of L. Cases, at p. 513.)

This view was referred to and adopted by Lord Halsbury in *Scholfield v. Londesborough*, [1896] A. C., where, at p. 523, he says: "If, to use Lord Cranworth's phraseology, the customer, by any act of his, has induced the banker to act upon the document, by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled or by neglect permitted to be misled."

The only case in which the banker would "make a payment on a forged order," to use Lord Cranworth's words, would be where he paid a cheque with the drawer's signature forged; "invalidity of a document which he has induced them to act on as genuine" points to the same conclusion; thus the original judgment and its approval by Lord Halsbury cover the situation. (Cf. *Lewes Steam Co. &c. v. Barclays*, 22 Times L. R. 739.)

The above were two of the numerous *dicta* which it was impossible to reconcile with the decision in *Commercial Bank of Australasia v. Marshall*, but that obstacle being now removed, they carry full weight.

Neither estoppel nor adoption can be effectually set up by a person whose own conduct or negligence has occasioned or contributed to the loss, and this, of course, applies to the case of the banker.

Contributory
negligence.

No doubt many of the earlier cases speak of a banker being bound to know his customer's signature, and of its being *ipso facto* negligence if he is misled by a forgery, but there can be no legal obligation of the sort, the law does not compel or exact the impossible, and, as pointed out by Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7, if the forgery is cleverly executed, the banker may not be able by any amount of care to ascertain whether or not his customer's signature is a forgery.

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As counterbalancing estoppel, it would seem therefore to be a question of fact whether the banker by exercising a due amount of care should have detected his customer's supposed signature to be a forgery.

As to whether the banker can recover the money from an innocent person to whom he has paid the cheque with the drawer's signature forged, see *post*, Payment by Mistake.

Raised Cheques

The second and more imminent head of danger to the banker from forgery is the fraudulent raising of the amount of a cheque.

Where the customer has originally drawn the cheque in the ordinary way, not leaving blanks or affording other facilities for alteration or addition, and the cheque is subsequently fraudulently manipulated so as to show a higher face value, which is paid by the banker, he clearly cannot charge his customer with the excess. (*Hall v. Fuller*, 5 B. & C. 750.)

Facilities for Raising

The real question arises when the customer, in drawing the cheque, innocently but carelessly leaves blank spaces before or after the words and figures specifying the amount. Sometimes the cheque is specially and intentionally so drawn by a clerk or employé contemplating fraud, and innocently signed by the employer in that condition. In either case the blanks are utilised by a fraudulent person to raise the face value of the cheque, and the raised amount is paid innocently and without negligence by the banker, the addition not being discoverable by exercise of reasonable care and diligence.

In the former editions of this book, it was at this point that the author was driven to long and strenuous argument combating the fallacies of *Commercial Bank of Australasia v. Marshall*, demonstrating how earlier

authorities and judgments of far greater weight were totally opposed to the erroneous and devastating conclusions arrived at in that unfortunate decision, and championing the impugned character of the historic *Young v. Grote*. Fortunately, all this can now be omitted, as ancient history. *London Joint Stock Bank v. Macmillan and Arthur* is inexpugnable and conclusive. It demolishes the *Commercial Bank of Australasia* incubus as being an absolutely erroneous decision; it rehabilitates *Young v. Grote* as good law, and good law on the basis most beneficial to bankers.

For the facts in *Macmillan's Case*, and the view taken by Lord Finlay, C., as to this matter, see *ante*, pp. 201 *sqq.* (Cf. the summary of the reciprocal duties of banker and customer, by Atkin, L.J., *ante*, p. 31.)

The Mac-
millan case.

Two passages only from the judgment of Lord Finlay need be repeated here. "If he (the customer) draws a cheque in manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty." "As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote, but a very natural consequence of neglect of this description."

These then are the indisputable rules to be henceforth applied in every case of this sort. It comes to this: Was it neglect of ordinary precautions to issue a cheque in such form, having regard to the possibility of its getting into dishonest hands?

CHAP. XIX.

It is much a question of degree. One sees, for instance, the force of the remarks of Bovill, C.J., in *Société Générale v. Metropolitan Bank*, 27 L. T. 849, where a "y" was inserted in a slight blank left after an "eight" in a bill, that "it was the usual way of filling up blanks in a form," and that "no man in the City would take notice of 'eight' not being close to the next word." That was not a case of banker and customer, but it can hardly be negligence not to be more careful than the average City man.

At the other extreme is the *Macmillan Case* itself, where the space for the amount in writing was left absolutely blank.

Indeed, as will be presently shown, there the judgments of two Law Lords proceeded mainly, that of Lord Finlay, C., alternatively, on a totally different ground, not applicable generally: and it is most fortunate that the case did not go off on that basis, but established the broad and vital principles above stated.

Although the *Macmillan Case* naturally dealt only with the form of the cheque, it is conceived that the doctrines of negligent ignorance, attributed knowledge, and unreasonable trust in subordinates would, so far as they are recognised in English law, be applicable in suitable cases to the question of raised cheques.

The *Macmillan Case* must not be pressed so as to impugn the principle that the banker cannot set up an estoppel against the customer where his own negligence had contributed to the loss, as where the alteration was obvious or discoverable by the exercise of reasonable care, or where the state of the cheque raised fair suspicion of its having been tampered with and payment was made without inquiry. (*Scholey v. Ramsbottom*, 2 Camp. 485.)

For certain purposes, the important feature of the *Macmillan* judgment is its vindication and exposition of the relationship and mutual duties of banker and

customer, at that time practically in suspension, now operative, not only with regard to raised cheques, but in many other phases of banking law. CHAP. XIX.

There is, however, another aspect of the case. Since *Lloyds Bank v. Cooke*, [1907] 1 K. B. 794, it has been generally recognised that estoppels with regard to bills and cheques are not confined to the specific cases provided for by the Bills of Exchange Act, as in sect. 20, but, by virtue of sect. 97 (2) or otherwise, include all estoppels known to the common law. Estoppel on inchoate instruments.

By this importation of the common law, the limitation in sect. 20 to the holder in due course, the source of so much difficulty in *Lloyds Bank v. Cooke*, was got over.

But it was commonly assumed that even the common law went no further than the person who takes a negotiable instrument as a holder or transferee, not necessarily by negotiation from a prior party, if that be essential to the character of holder in due course. Thus the payee would be included, the doubtful case under sect. 20.

Moreover, the prevalent idea was that the common law dealt only with the plain blank stamped paper delivered to be filled up as a bill or note for the purpose of negotiation.

The *Macmillan Case* has greatly expanded both the range and the applicability of this doctrine. The document in that case was not strictly a blank stamped piece of paper, not what would usually be termed a blank cheque. True, there was nothing at all in the space allotted to the amount in writing, but there was the "2" in the space for figures.

Sect. 9 (2) says "where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable."

That does not apply here; there was no sum expressed in words, therefore no discrepancy, and no sum denoted

CHAP. XIX. in words to be payable. Still, it shows that the words are the dominating factor.

Possibly this was in the minds of the House of Lords. For they treat the absence of any sum expressed in words as putting the cheque on the footing of a blank cheque, the blank stamped paper which is the ideal starting point of estoppel whether under common law or the Bills of Exchange Act.

Lord Finlay says, [1916] A. C., on p. 881, "But further, it is well settled law that if a customer sign a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent. This has been suggested as the real ground for the decision in *Young v. Grote*." His Lordship says he does not think it was the real ground, and proceeds, "But the principle is thoroughly established, and it seems to me to apply to the facts of the present case. On this ground also, which on my view of *Young v. Grote* is independent of that decision, I am of opinion that the appeal should be allowed." Lord Shaw said it was a very near approach to a blank cheque.

Lord Haldane took the same line and laid considerable stress on the provisions of sect. 20 relating to cheques wanting in any material particular. Lord Parmoor's judgment is also founded on the general estoppel basis rather than on any breach of duty between banker and customer.

It seems to have been taken for granted that, for the purpose of estoppel, the paying banker was in the same position as a transferee, and there appears no reason why it should not be so. The cheque, so far as the signature goes, is a mandate which the paying banker is bound to obey, the customer must be taken to contemplate its effect on him at least as much as on a transferee, and on this basis he would seem entitled to at least equal protection.

It would be presumptuous to criticise the treatment of the cheque in the *Macmillan Case* as being tantamount to a blank cheque. As Lord Shaw said, it was a very near approach to one, and the regarding it as one seems a very reasonable extension of the stricter rule. There are several cases where a marginal note has been put on a bill, specifying a sum differing from that expressed in the body of the bill, and such marginal note has been disregarded (*Garrard v. Lewis*, 10 Q. B. D. 30), which are somewhat analogous.

The application of sect. 20 appears more doubtful. Sect. 20. Whether the cheque be treated as the result of signing a blank stamped paper or a bill wanting in a material particular, the instrument, if not filled up in accordance with the authority given and within a reasonable time, is only valid and effectual in the hands of a holder in due course (see the section), which the paying banker clearly never was.

There are several things to be noted about this apparently new development.

The estoppel is in no way dependent on the existence of a duty or the breach of it; it is not a question of negligence, save possibly in the sense of a man's duty to the public.

It may seem a contravention of Lord Bowen's well-known *dictum* about a negotiable instrument not being a gun, or a dangerous animal, but one deduction from this part of the case is that if a man chooses to put his hand to an inchoate or incomplete negotiable instrument and hands it to someone else either to negotiate or get money on, he is responsible to anybody who is injured by the agent's misuse or abuse of the instrument. In substance, he has let loose an animal or a contrivance, potentially if not intrinsically dangerous to his fellow creatures. It may be suggested that, in the above proposition, the factor of deputing the filling up, included

CHAP. XIX. by Lord Finlay, has been omitted. But there was no evidence or suggestion in the *Macmillan Case* that Arthur, the partner who actually signed the cheque, gave any authority to the fraudulent clerk to fill it up. He was in a hurry and simply did not notice that it was not filled up for £2. The position, therefore, appears fairly stated as it is ; the handing the, in fact, inchoate instrument to another person for the purpose of negotiation or getting money must be taken to involve authority to complete it, whether the signatory knows it is incomplete or not.

Another construction is that the emission of an inchoate or incomplete negotiable instrument is a holding out of it as completed, even when completed wrongfully. If that be taken as the fundamental principle, the issuer's knowledge or ignorance of the incompleteness must, again, be regarded as immaterial. On either theory, the result appears an advance on previous decisions, which seem to have postulated knowledge, if not intention, as an element of liability, where inchoate or incomplete instruments were concerned. It is, however, essential that the inchoate instrument should be delivered for negotiation or to get the money ; if, as in *Smith v. Prosser*, [1907] 2 K. B. 735, it were merely handed over for safe keeping, awaiting further instructions, and the custodian wrongfully filled up and dealt with it, neither transferee nor drawee could avail himself of either the inchoate instrument or the holding out line of argument. If drawee were the banker, as in a cheque, he would have to rely on the relation of banker and customer, which would probably not suffice. There are circumstances which would fully justify a reasonable man in leaving such an instrument in the hands of a trusted friend or subordinate, to be used if occasion required.

The consequences of this pronouncement in the *Macmillan Case*, especially the importation of sect. 20 into the matter, are far reaching, but it is not easy to

prognosticate the conditions and facts which will bring it into play. Suffice it that the principle is established. CHAP. XIX.

In *Colonial Bank of Australasia v. Marshall*, as in the earlier raised cheque cases, the customer only took objection to being charged with the excess over the original amount. In the *Macmillan Case*, the original sum was negligible, if existent, and the point was not raised. There are, however, expressions in other cases which, taken strictly, would seem to suggest a doubt as to the banker's right to debit even the original amount, if he is precluded from debiting the excess. Amount chargeable.

“Any alteration in a material part of any agreement or instrument avoids it, because it thereby ceases to be the same instrument.” (*Master v. Miller*, 4 T. R. 320.) “The question is whether the alteration introduced made it a different note; if it be material, it is a different note.” (*Knill v. Williams*, 10 East. 431.) “It is further to be considered whether the crossing was part of the cheque, so that the erasure of it would amount to a forgery of another and different cheque from that which the plaintiff drew; for if it had that effect, the plaintiff never drew the cheque that the banker paid, and the banker cannot claim credit for it.” (*Simmons v. Taylor*, 2 C. B. N. S., at p. 539; see also p. 541, 4 C. B. N. S. 463.) “If unfortunately he (the banker) pays money belonging to the customer upon an order which is not genuine, he must suffer; and to justify the payment, he must show that the order is genuine, not in signature only, but in every respect.” (*Hall v. Fuller*, 5 B. & C., at p. 757. See also *Suffell v. Bank of England*, 9 Q. B. D. 555.)

The alteration of the amount is, of course, material (cf. Bills of Exchange Act, 1882, s. 64), and under that section avoids the bill or cheque. The right given in the proviso to utilise the bill as if unaltered and enforce payment according to its original tenor, where the Material alteration.

CHAP. XIX.

alteration is not apparent, is confined to a holder in due course, and does not extend to the banker. On the other hand, in *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, the Judicial Committee treat a raised cheque as having been a good cheque for the original amount; but the authority is not strong or direct.

Though it would be unreasonable for a customer to question the payment up to the original amount, it must be confessed that in the light of the above cases and their application to the relation of banker and customer, the banker's position does not seem over-secure, even as to the original amount.

Contentions
for banker.

It may be contended that the avoidance by material alteration obtains in its extreme rigour only against a party setting up the instrument either as ground of action or direct means of defence. But that is not consonant with the cases above cited, and is only most vaguely deducible from *Suffell v. Bank of England*.

Possibly the banker's best contention would be that where it is a question of mere unauthorised addition or increase; where the genuine can be disentangled from the false, the customer's mandate still holds good *pro tanto*: in the same way as Lord Ellenborough "with the eyes of the law" read the erased but still legible £57 instead of the substituted £66 in *Henfree v. Bromley*, 6 East, 309.

Cases not
covered.

But this contention, even if maintainable, would not help in cases where the cheque was so altered as to completely merge its identity and directly contravene the customer's mandate. A crossed cheque opened by "Pay-Cash" and the signature of drawer forged; a post-dated cheque in which the date is altered to an earlier one (cf. *Vance v. Lowther*, 1 Ex. D. 176); "order" altered to "bearer" and falsely initialled; all these are material alterations which entirely eliminate the customer's

mandate. The last instance is a particularly hard one, inasmuch as if the fraudulent person had left the "order," but forged the indorsement, the banker would be protected by sect. 60. CHAP. XIX.

This question does not seem affected by the *Macmillan Case*. If, as there, no sum was filled in in writing, the whole raised amount could be debited, under either of the alternative grounds of Lord Finlay's judgment. If a sum had been filled in but raised, the matter would stand as hereinbefore stated.

Forged Indorsement on Domiciled Bills

The third head of forgery involving danger to the banker is forged indorsement on bills accepted payable at his bank. With regard to these there is, of course, no statutory protection whatever. Neither sect. 60 of the Bills of Exchange Act, nor sect. 19 of the Stamp Act, 1853, has any bearing on the question; inasmuch as the bill, even if payable on demand, is not drawn on the banker. The payment is made to the wrong person, and the banker is therefore not entitled to debit his customer. (*Robarts v. Tucker*, 16 Q. B. D. 560; *Vagliano v. Bank of England*, [1891] A. C. 107.)

There is no question of inchoate instrument, incomplete instrument, or holding out. The acceptor has no possible means of preventing forged indorsement. The duty of customer to banker applies, however, with full force to the payment of domiciled acceptances, as being definitely the exercise of the functions of a mandatory, and such protection as can be derived therefrom is undoubtedly open to the banker.

The banker's line of defence, if any, against the customer in such cases depends upon certain considerations. If the payee is a fictitious or non-existing person, the banker is discharged and can debit the customer as having paid the bearer of a bearer bill within sect. 7, Banker's
defence.

Fictitious or
non-existing
person as
payee.

CHAP. XIX. sub-sect. 3. The decisions on this sub-section with regard to cheques, viz. *Vinden v. Hughes*, [1905] 1 K. B. 795 ; *Macbeth v. North and South Wales Bank*, [1908] A. C. 137, whilst differentiating the case of cheques, have left the bearing of the sub-section on bills as it was established in *Vagliano's Case*, [1891] A. C. 107.

On a bill, a real, existing, specific person may, as against the acceptor, be fictitious or non-existing as payee although he be known to the acceptor, who accepted with full intention that such person, either by himself or a transferee by his indorsement, should receive the money, if such person's name was introduced by the drawer, or inserted by a fraudulent person, by way of pretence only and with no intention that he should ever obtain or have anything to do with the bill.

" Whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence " (*per* Lord Herschell, [1891] A. C., at p. 153 ; see also pp. 153-4, showing that it makes no difference whether the drawer's name be genuine or forged).

By whom bill
may be so
treated.

The right to treat the bill as payable to bearer is not confined to a holder, but may be set up by anyone to whose interest it is to do so ; for instance, by a banker who has paid a bill domiciled with him, which was the case in *Vagliano v. Bank of England*. The knowledge or ignorance of the acceptor as to the fictitious or non-existing character of the payee is immaterial.

Act of
customer.

If the customer has by his act accredited the bill with the forged indorsement to the bank, or put upon the bank a risk greater than that involved by the possibility of a forged indorsement on a genuine bill, the customer must bear the loss.

In *Vagliano's Case, ubi sup.*, the drawer's name, as well as that of the supposed payee, was the work of the forger, and the documents were not really bills at all. The House of Lords held that Vagliano, by writing an acceptance on such documents, represented to the bank that, up to that stage at least, they were genuine bills, involving none but the ordinary risk ; and that this representation being in fact untrue, the bank were entitled to be indemnified. (See, specially, *per* Lord Macnaghten, at pp. 158, 159 ; *per* Lord Halsbury, at p. 114.)

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Vagliano's
case.

So, again, the inclusion of these spurious documents in letters of advice to the bank of bills coming forward for payment was an act of the customer directly tending to mislead the bank, though such letters could not be read as guaranteeing any indorsement.

A valuable feature in the case is the assertion of the right of bankers, acting as agents for the payment of domiciled bills, to all the protection, consideration, and indemnities to which an ordinary agent is entitled as against his principal. " A principal who has misled his agent into doing something on his behalf which the agent has honestly done would not be entitled to claim against the agent in respect of the act so done." (Lord Halsbury, at p. 114.) " It is not disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of these circumstances ; the fact that there was no real payee might be another ; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would

Rights as
agents.

CHAP. XIX. not otherwise have paid, ought also to be an answer to that *prima facie* case. If the bank acted upon such a representation in good faith and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer and not the bank ought to bear." (Lord Selborne, at p. 124.)

The negligence on the part of the customer spoken of by Lord Selborne must, however, be understood as limited to negligence directly leading to the loss, or "enabling" it, in the legal sense of the phrase, to be committed. (*Farquharson v. King*, [1902] A. C. 325; *Vagliano's Case*, [1891] A. C., at p. 115.)

This duty of taking care is here based on the same ground as in the *Macmillan Case*, namely, the relation of principal and agent. The intervention of forged indorsement, as before stated, is not a matter which the customer can possibly obviate; and if he has not been negligent in other respects, forged indorsement would absolve him from liability to the banker.

Liability to
true owner.

Apart from any question between himself and his customer, the banker who pays a bill domiciled with him on a forged indorsement is liable to the true owner for conversion of it, the payment being to an unlawful possessor, incapable of giving a discharge (*Smith v. Union Bank of London*, L. R. 10 Q. B., at p. 295; 1 Q. B. D., at p. 35); there being no protection to the banker answering that of sect. 60 with regard to cheques.

The banker would, of course, have a theoretical remedy against the person who received the money, if he were the forger or a party to the fraud.

As to the banker's position where the money has been paid to a person who took the bill *bonâ fide* and for value without notice of the forgery, see "Money Paid by Mistake."

Adoption or Ratification

One phase of the doctrine of estoppel or adoption, previously referred to, appears applicable to all classes of forgery, and has therefore been reserved for fuller treatment here.

It is sometimes said that a forgery cannot be ratified, and the language of sect. 24 of the Bills of Exchange Act, 1882, seems to countenance this view (see Chalmers on Bills of Exchange, 8th edit., p. 85). But the true doctrine appears to be confined to this, that public policy forbids a man to extort from another, whose signature has been forged, an undertaking to be responsible as if the signature were genuine, as the price of forbearing criminal proceedings against the forger. (*Williams v. Bayley*, L. R. 1 H. L. 200; *M'Kenzie v. British Linen Co.*, 6 A. C., at p. 99.)

Anyway, it is clear that a man may, by his conduct or silence, be estopped from denying his signature or be held to have adopted the forged instrument. (Cf. Chalmers, 8th edit., p. 85, and cases there cited, notes (i) and (l).)

If a man knows or has reasonable ground for believing that his name has been forged on a bill or cheque and that it is about or likely to be presented for payment to a banker, he is bound with reasonable despatch to warn the banker of the fact. If he does not, and the bank's position is thereby prejudiced, he adopts the bill or cheque. (*M'Kenzie v. British Linen Bank*, 6 A. C. 82, particularly pp. 92, 101, 109; *Ogilvie v. West Australian &c. Co.*, [1896] A. C. 257, 270; *Ewing v. Dominion Bank*, [1904] A. C. 806; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96 (Supreme Court of the United States); *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356.)

Duty to warn
of forgery.

The above doctrine is not confined to customers. Where the relation of banker and customer exists, there

Not confined
to customers.

CHAP. XIX. is no doubt the more tangible ground of duty arising out of the relation.

In *M'Kenzie v. British Linen Bank* there was no relation of banker and customer. M'Kenzie was no customer of the bank. It is specially stated in the head-note that the bank had had no previous dealings with A., i.e. M'Kenzie, so also at p. 83 and p. 96; and the judgments in no way hinge on or even suggest such relation. In *Ewing v. Dominion Bank* there was no relation of banker and customer. In *Ogilvie v. West Australian &c. Co., ubi sup.*, at p. 268, the Judicial Committee say "With regard to *M'Kenzie v. British Linen Bank* and similar cases the ground upon which the plea of estoppel rested in these cases was the fact that the customer, being in the exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced." So far as *M'Kenzie v. British Linen Bank* is concerned, the statement that the relation of customer and banker was involved is incorrect, and the case itself contains nothing limiting the principle to that relation: rather the contrary.

Moral duty.

The obligation, outside any contractual relation, is based on a duty formerly hardly recognised as a moral one, but now elevated to a legal one. The obligation and duty require that a business man, or even one unconnected with business, must not willingly allow a fellow-man, or even a body corporate, to be prejudiced by the fraudulent use of a forged instrument to which he has set, or appears to have set, his hand. "Duty required of him by the rules of fair dealing between man and man." (*Ogilvie v. West Australian &c. Co.*, [1896] A. C., at p. 269; *Ewing v. Dominion Bank*, [1904] A. C. 806; for report below see Canada Supreme Court Reports, vol. xxxv. 133, where the judgments of the majority are based solely on this view.

It is immaterial how the forged signature be utilised on the bill or cheque, whether as that of drawer, acceptor, or indorser, and there seems no need to confine the doctrine to signatures. It was applied to genuine cheques with fraudulently raised amounts in two of the American cases previously cited with reference to the pass book ; and though the English cases have had to do with forged signatures, the abuse of a genuine signature by means of forgery presents no distinctive feature.

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Form of
forgery
immaterial.

Actual knowledge of the forgery is probably not essential. Lord Selborne, in *M'Kenzie v. British Linen Bank*, 6 A. C., at p. 92, speaks of "reasonable ground to believe," and the judgments in the American cases (see *ante*, "The Pass Book") include convincing reasons for the conclusion, there arrived at, that, for this or a like purpose, a man must be treated as in possession of knowledge which, but for his own negligence, he could not have failed to acquire. (Cf. *per* Lord Watson, in *Scholfeld v. Londesborough*, [1896] A. C., at p. 543 ; *Jacobs v. Morris*, [1902] 1 Ch. 830 ; *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356.)

Constructive
knowledge.

Mere silence, without resulting injury or prejudice to the bank, does not work estoppel or adoption. (*M'Kenzie v. British Linen Bank*, *ubi sup.*, at pp. 109, 111, 112.) The prejudice or injury to the bank, resulting from the customer's or other person's silence, which will estop him from disputing his signature or constitute adoption by him of the bill or cheque, is not confined to payment thereof. The customer or other person will be equally bound if, by his silence, the bank are precluded from the opportunity of protecting themselves against subsequent forgeries, if any, by the same person, or lose the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction in the interval. And it is immaterial whether civil proceedings against the forger would have been likely to result in

Prejudice
or injury.

CHAP. XIX. getting the money back or not. (*M'Kenzie v. British Linen Bank*, 6 A. C. 82, and Scotch cases cited there at p. 110 ; *Ogilvie v. West Australian &c. Co.*, [1896] A. C. 257, 270 ; *Ewing v. Dominion Bank*, [1904] A. C. 806 ; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96 ; cf. *Knights v. Wiffen*, L. R. 5 Q. B. 660.)

A dictum in *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C., at p. 57, apparently treating the financial position of the forger as material, is used in another connection and cannot stand against the above authorities.

This principle of estoppel or adoption is particularly valuable to the banker ; inasmuch as, when it can be put in force, it affects all cheques previously forged by the same person, though the fraud may only have been discovered with regard to the last of the series.

The banker cannot, of course, set up estoppel or adoption when the loss is attributable, even in part, to his own negligence ; as where he has failed to detect an obvious forgery or alteration. (Cf. *Critten v. Chemical National Bank of New York*, 171 New York Reports, 219.)

CHAPTER XX

SECURITIES FOR ADVANCES

1. LAND.
2. STOCKS AND SHARES.
3. THE BANKER'S LIEN.
4. PLEDGE.
5. DOCUMENTS OF TITLE TO GOODS.

1. *Land*

IN former editions of this book considerable space was allotted to the subject of mortgages, legal and equitable, of land. It is not proposed to do so again. Mortgages are governed by an immense and complicated mass of statute and case law, and are the subject of many exhaustive treatises of acknowledged authority. The banker's position as a mortgagee differs in no wise from that of anyone else who takes a mortgage. A legal mortgage of land is a highly technical instrument, to say nothing of the preliminary researches as to title, encumbrances, and so on. No banker or reasonable man would entertain such a security without full and independent professional advice; certainly not on anything to be derived from a law book by one not professing any special knowledge on the subject.

Even the less recondite process of equitable mortgage is not all plain sailing and has its own particular dangers.

All the same, a banker may find himself confronted with an old and trustworthy customer who wants an immediate advance of a reasonable sum for a reasonable period, with as little formality or publicity as

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possible, and who has only land, freehold or leasehold, to offer as security.

Equitable mortgage.

In such a case the banker may stretch a point and accept an equitable mortgage of the land, by deposit of the title deeds or land certificate, with or without a memorandum of deposit.

“The deposit of title deeds with bankers makes the bankers mortgagees in the eye of Equity.” (*Foster v. Barnard*, [1916] 2 A. C., at p. 160, *per* Lord Haldane.)

Deposit of title deeds carries with it the right to call for a legal mortgage, and the remedies on an equitable mortgage, though they may necessitate recourse to the Court, are as effectual as on a legal one.

A memorandum is usually taken to serve as a record of the terms of deposit, but it must be borne in mind that such memorandum constitutes a “conveyance” within the meaning of the Lands Registry Acts and has therefore to be registered to secure priority, if the land affected is within the jurisdiction of those Acts. (*Credland v. Potter*, L. R. 10 Ch. 8; *In re Calcott & Elvin's Contract*, [1898] 2 Ch. 460.) And this ruling has been extended to letters amounting to an undertaking to deposit title deeds as security. (*Fullarton v. Provincial Bank of Ireland*, [1903] A. C. 309.) But deposit without anything more is not a “conveyance.” (Same case, at p. 314.)

Land Transfer Acts.

Where the Land Transfer Acts are in operation and the land is registered thereunder, the land certificate takes the place of the title deeds as a medium of equitable deposit, or an existing charge may be utilised by deposit of the certificate of charge.

The effect of such deposit is stated in sect. 8 of the Land Transfer Act, 1897, as follows:

“The registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates charges or rights, create a lien on the land or charge by deposit of the land certificate or certificate of

charge, and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title deeds, or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit or by a mortgagee beneficially entitled to the mortgage." (Cf. Williams on Real Property, 23rd edit., p. 718.)

Where the land certificate is the thing deposited, it has to be exchanged for a certificate of charge, which can be utilised, if necessary, to create a sub-charge. Inasmuch as the process leading up to the issue of such certificate involves the intervention of a deed, the holder of a registered charge gets a power of sale under sect. 27 of the Land Transfer Act, 1875. For forms and procedure, see Brickdale & Sheldon on the Land Transfer Acts.

Apart from any question of Registry or Land Transfer Acts, the possession of title deeds gives the banker protection against subsequent dealings with the land by his debtor. Priorities.

"It is the duty of anyone taking a mortgage to obtain the deeds." (*Coleman v. London County & Westminster Bank*, [1916] 2 Ch. 353.)

"A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a court of equity takes away nothing he has honestly acquired." (Stirling, L.J., in *Taylor v. London & County Bank*, [1901] 2 Ch. 231.)

But he must have honestly acquired it, and he does not do so if he takes no steps whatever to satisfy himself that the person he takes it from can honestly part with it or shuts his eyes to circumstances tending to show that such is not the case. In the words of the Conveyancing Act, 1882, s. 3, a mortgagee is to be prejudicially affected by notice of any instrument, fact or

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thing which is within his own knowledge or would have come to his knowledge if such enquiries and inspections had been made as ought reasonably to have been made by him. No reasonable man would take a security on land without getting or at least inspecting the title deeds ; and a man who takes a legal mortgage without doing so will in ordinary cases get no priority over a prior equitable mortgagee who has got the deeds. Nor can a *cestui que trust* claim any priority so lost by his trustee. (Cf. *Walker v. Linom*, [1907] 2 Ch. 114, 118.)

So much does equity favour the equitable mortgagee that in extreme circumstances a prior legal mortgagee may be postponed to him ; but to effect this there must be such carelessness on the part of the former as amounts to neglect of the precautions of an ordinary reasonable man and indicates indifference to obvious risks. (*Hudston v. Viney*, [1921] 1 Ch. 98, 104 ; cf. *Grierson v. National Provincial Bank*, [1913] 2 Ch. 18.)

So even an equitable mortgagee without notice of a prior equitable title cannot gain priority over the latter by getting in the legal estate, if there are circumstances which make it inequitable for him to do so. (*Taylor v. Russell*, [1892] A. C., at p. 253.)

And an equitable mortgagee may be postponed to a subsequent equitable mortgagee where he has allowed his mortgagor to retain or regain possession of the title deeds and so enabled him to borrow from the subsequent mortgagee who has got possession of them, unless the relation between the first incumbrancer and the person with whom he leaves the deeds is not merely that of mortgagor and mortgagee, but is of a fiduciary nature, such as that of client and solicitor, so that there is no negligence or impropriety in so leaving them. (*Taylor v. London & County Bank*, [1901] 2 Ch., at p. 261.)

If for any sufficient reason the banker has to let the deeds out of his hands, a written undertaking should

be taken from the borrower to return them within a specified period. CHAP. XX.

The question of tacking is not likely to trouble the banker. He would hardly take a second mortgage; if he did, he would take good care that nobody got a third without notice.

Mortgages by a company entail special precautions. Not only must the banker be satisfied that the company has power to borrow on mortgage in the manner proposed, but the requirements of sect. 93 of the Companies (Consolidation) Act, 1908, as to registration within 21 days must be complied with. The 21 days run from the time when the charge is created by the company, as when deeds are deposited, not from the date of the actual advance. (*Esberger v. Capital & Counties Bank*, [1913] 2 Ch. 366.)

Notice of Second Mortgage

There is, however, one question of priorities which particularly concerns bankers, and applies equally to legal and equitable mortgages. It arises where a mortgage is given to secure past and future advances or future advances alone, and the mortgagee receives notice that the mortgagor has parted with his reversionary interest, or has created a further charge thereon. Such notice need not be from a second incumbrancer; he is not bound to give it. *Grierson v. National Provincial Bank*, [1913] 2 Ch. 18.

Advances
made after
notice of
further
charge.

It was at one time an open question whether advances made by the first mortgagee after such notice were chargeable on the security in priority to the claims of the person who had acquired the reversionary interest or the further charge. The decision of the House of Lords in *Hopkinson v. Rolt*, 9 H. of L. Cases, 514, established conclusively that a first mortgagee cannot claim priority for voluntary advances made on such a security after notice of a second mortgage. Lord Campbell's judgment in that case clearly demonstrates that the rule as

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laid down does not bear hardly on a banker who receives notice of such second charge, inasmuch as his security is in no wise affected with respect to advances prior to the date of notice, and it is entirely within his option whether or no he will make further advances after that date. "The hardship upon bankers at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes the bankers have only to consider (as they do as often as they discount a bill of exchange) what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss" (p. 535). Recognised in *Deeley v. Lloyds Bank*, [1912] A. C. 756.

Union Bank of Scotland v. National Bank of Scotland, 12 A. C. 53, is another decision of the House of Lords to the same effect, and affords a particularly strong example of the principle, because there the disposition of property in the first instance was on the face of it absolute, and it was only from collateral facts that it could be shown to be in the nature of a security only. The doctrine of *Hopkinson v. Rolt* applies equally or, perhaps, *à fortiori* where the second disposition of the property is an absolute sale of the residuary interest, of which the mortgagee has notice. (*London and County Bank v. Ratchiffe*, 6 A. C. 722.) The principle was also approved in *Bradford Banking Co. v. Henry Briggs & Co.*, 12 A. C. 29. In this latter case Lord Blackburn says of the decision in *Hopkinson v. Rolt*: "It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor" (p. 37).

In *Deeley v. Lloyds Bank*, *ubi sup.*, at p. 781, Lord Shaw says: "In the case of a grant of a mortgage to

a bank by a customer in security of advances made or to be made, there of course remains in the customer an estate capable of being disposed of by sale or affected by subsequent mortgage, and if a second mortgage is granted and notice given to the first mortgagee, it is contrary to good faith upon the part of the bank as first mortgagee to make in its own favour encroachments upon that remanent estate which would in effect enlarge the scope of the first mortgage and make it stand as cover for fresh advances."

Nor can it make any difference that the mortgagee has bound himself to make advances on the security to a certain amount, which amount had not been reached at the date of the notice.

Where mortgagee has agreed to make further advances.

In *West v. Williams*, [1899] 1 Ch. 132, this question was settled by the Court of Appeal holding that the mortgagor, by borrowing from other quarters on the same security, released the first lender from the obligation to make further advances; and that, if he did so after notice, such advances must be treated as purely voluntary on his part.

Lindley, M.R., says (p. 143): "Even if the first mortgagee has agreed to make further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him, and from no one else; and if the mortgagor chooses to borrow from some one else and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them."

Chitty, L.J., says (p. 146): "The covenant to make further advances creates no difficulty, and for this reason: the covenant is to make the further advance

CHAP. XX. on the security of the property, and inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan."

When title deeds are deposited with a banker he is not entitled to the usual six months' notice of payment off, the transaction being regarded as of a temporary nature. *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385.

2. Stocks and Shares

Stocks and shares, not being chattels or negotiable instruments, are more fitly treated as the subject of mortgage than as that of pledge. (Cf. *Harrold v. Plenty*, [1901] 2 Ch. 314; *Deverges v. Sandeman, Clark, & Co.*, [1902] 1 Ch. 579; *Stubbs v. Slater*, [1910] 1 Ch. 632.) The deposit of certificates constitutes an equitable mortgage, which the Court will enforce by order for transfer and foreclosure. (*Harrold v. Plenty*, *ubi sup.*) The equitable mortgagee by deposit of certificates may also obtain an injunction against transfer by the mortgagor in fraud of his rights. (*Société Générale v. Tramways Union, Ltd.*, 14 Q. B. D. 424, *per* Lindley, L.J., at p. 453.) As in the case of land, however, the Court has power to decree transfer and sale in lieu of transfer and foreclosure. Possession of the certificates alone might enable a sale to be made, but, in the absence of transfer, the mortgagee would have no power of carrying out the sale, even if power of sale were given by a memorandum of deposit. A contract to transfer is no doubt implied in the deposit of the certificates, and if the mortgagor voluntarily transfers, there would be no need to resort to the Court. Even the trustee of a bankrupt mortgagor by deposit of certificates would be ordered

to transfer, the jurisdiction not being taken away by the bankruptcy, and rule 75 of 1915 being confined to mortgages of real or leasehold property. But both for facility of realisation and securing priority, immediate legal transfer of stock or shares is desirable. A man may be a registered shareholder or stockholder, may hold the certificates, and so be in a position to deal with or transfer the shares or stock, but by reason of his holding a fiduciary position, such as that of trustee, or by reason of prior equitable charges on the security, there may be persons entitled to an equitable interest therein which does not appear. To oust such equitable rights, a person subsequently taking the shares or stock by way of sale or mortgage must not only do so honestly and for value and without any notice of the prior equitable rights, but he must complete his title by acquiring the legal estate. What constitutes the completion of the legal title must partly depend on the constitution and regulations of the particular company or undertaking.

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Transfer of
legal estate.

If the transfer of shares or stock can only be made by deed, as in the case where the Companies Clauses Consolidation Act applies, or as may be required by the articles of association, the delivery of a blank transfer is not sufficient to pass the legal estate. As Lindley, L.J., says in *Powell v. London and Provincial Bank*, [1893] 2 Ch., at p. 560: "We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed."

The person to whom it is delivered is not authorised or able to make it a complete deed by filling up the blanks. It may be redelivered by the transferor after being so filled up, and so become effectual as from the date of redelivery.

An agent cannot effect such redelivery unless himself

CHAP. XX. authorised by deed. (*Powell v. London and Provincial Bank*, [1893] 2 Ch. 555; *Société Générale de Paris v. Walker*, 11 A. C. 20.)

Where, however, the transfer is not necessarily by deed, a blank transfer authorises the transferee to fill up all necessary blanks, and thereupon operates as a good transfer without delivery. (*Ireland v. Hart*, [1902] 1 Ch., at p. 527; cf. *Fuller v. Glyn Mills & Co.*, [1914] 2 K. B. 168.)

Registration.

In practically all companies, however, the regulations prescribe more than the mere transfer for the completion of a legal title. Registration is a usual requisite, and in such case the transferee must obtain himself to be registered, or at any rate must acquire a present, absolute, and unconditional right to be registered as a shareholder before he is affected with notice of the prior equitable title. (*Société Générale de Paris v. Walker*, 11 A. C., at pp. 29–41; *Moore v. North-Western Bank*, [1891] 2 Ch. 599; *Ireland v. Hart*, [1902] 1 Ch., at p. 529; cf. *Fuller v. Glyn Mills & Co.*, *ubi sup.*) The circumstances constituting this unconditional right have never been defined, and its efficacy, save in very special and equally undefined instances, has been doubted. (See *Ireland v. Hart*, *ubi sup.*)

But it is clear that neither legal transfer nor registration will avail to defeat prior equities unless the procedure throughout is untainted by notice, actual or constructive, or by conduct savouring of sharp practice. (Cf. *London and County Bank v. Nixon*, [1901] 2 Ch. 231; *Re Old Bushmills*, [1896] I. R. vol. i. 328.)

Registration is ineffectual to perfect a transfer which is in itself inoperative and of no effect. (*Powell v. London and Provincial Bank*, [1893] 2 Ch., at p. 566.)

And where the invalidity of such transfer arises from its being a forgery, registration thereon at the instance of the banker subjects him to serious peril.

By sending in a transfer to himself for registration, the banker probably warrants that the transfer is genuine, he certainly undertakes to indemnify the company against any loss or liability they may incur by acting on it as genuine, should it prove to be a forgery. Should it so prove, the banker would have no claim to the stock or shares, the name of the original holder would have to be restored to the register, and the banker would be liable for any dividends received.

It may well happen that the banker has transferred the stocks or shares, ostensibly conveyed to him, to innocent third parties, such as nominees of the borrower, on repayment of the loan, and that such persons have been registered and had certificates issued to them by the company. In such case the company would be estopped from disputing the title of such transferees. The company would still, however, have to restore the original holders to the register, and the banker would, on the implied indemnity, be liable for the full amount of the stock or shares, at the market price, if they had to be purchased in the market, together with all back dividends. Inasmuch as the right of action on the indemnity only arises when the company has to restore the original owners to the register, the bank might be held liable any number of years after the original transaction had been apparently closed. (*Corporation of Sheffield v. Barclays*, [1905] A. C. 392; cf. *Starkey v. Bank of England*, [1903] A. C. 114.) It makes no difference that certificates have been issued to the bank on registration. (Cf. *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.) That had been done in *Corporation of Sheffield v. Barclays*. The banker cannot claim an estoppel based on his own misrepresentation (cf. *Att.-Gen. v. Odell*, [1906] 2 Ch. 47), or the point is immaterial in view of indemnity.

CHAP. XX.

Forged
Transfers
Acts.

The Forged Transfers Acts, 1891, 1892, presumably meet this danger in the case of securities of companies and corporations having adopted those Acts.

It could hardly be contended that there was no "loss arising" to the ostensible transferee because the forged transfer gave him no rights to dispose of or lose, on the analogy of *Att.-Gen. v. Odell*, *ubi sup.* The loss arises from his getting nothing for his money, not, as had to be proved in that case, from the ratification of the register, and the whole scheme and wording of the Acts preclude any such suggestion.

Policies of Life Assurance

Theoretically a banker has an insurable interest in the life of a person who is indebted to him, and could himself take out a policy thereon. It is more usual, however, for the debtor to take out the policy and utilise it as security. The mere deposit of the policy constitutes an equitable mortgage or gives the banker the rights of an equitable mortgagee. (*Spencer v. Clarke*, 9 Ch. D. 187.)

Where a policy has been deposited, even without a memorandum; and the depositor becomes bankrupt, the trustee in bankruptcy cannot claim the policy without satisfying the claim of the banker. (*Re Wallis*, [1902] 1 K. B. 719.) But to constitute complete security, the policy should be assigned by deed and notice given to the company. In default of notice, payment by the company would be good as against the assignee. (Policies of Assurance Act, 1867, 30 & 31 Vict. c. 144, s. 3.)

The assignment should provide for payment of premiums by the insured and for the surrender of the policy at surrender value in case of need.

3. *The Banker's Lien.*

Apart from any special security, the banker can look to his general lien as a protection against loss on loan or overdraft. The general lien of bankers is part of the law merchant and judicially recognised as such. (*Brandao v. Barnett*, 12 Cl. & Fin. 787.)

As stated in that case (p. 806), "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien." See also *per* Buckley, J., *In re London and Globe Finance Corporation*, [1902] 2 Ch. 416.

What class of securities may be the subject of lien is not very clearly defined. The words used in *Brandao v. Barnett* are "all securities." In *Davis v. Bowsher*, 5 Term Reports, 488, Lord Kenyon, C.J., uses first the words "all the securities," but afterwards says: "Whenever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance." Grose, J., uses the term "paper securities."

Securities
subject to
lien.

The class of securities covered by these definitions cannot, on the one hand, be limited to fully negotiable securities. In *In re United Services Company*, L. R. 6 Ch. 212, share certificates; in *Currie v. Misa*, 1 A. C. 564, an order to pay money to a particular person; in *Jeffryes v. Agra and Masterman's Bank*, L. R. 2 Eq. 674, a species of deposit receipt, were all held subject to the banker's lien, though none of them was negotiable. On the other hand, the general lien cannot be said to extend to all classes of documents, even though they might otherwise be utilised as security.

In *Wylde v. Radford*, 33 L. J. Ch. 51, Kindersley, V.-C., expressed the view that a conveyance of land was

CHAP. XX. not subject to the general lien. He said: "The cases refer to a deposit of documents which are in their nature securities, but there is some ambiguity in the term 'securities.' Anything may of course be deposited, and deeds or plate, after they have been deposited, may be said to be a security; but what is intended is such securities as promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign Governments, &c., and the Courts have held that if such securities are deposited by a customer with his banker, and there is nothing to show the intention of such deposit one way or the other, the banker has, by custom, a lien thereon for the balance due from the customer." See, however, *In re Bowes*, 33 Ch. D. 586, and *Mutton v. Peat*, [1900] 2 Ch. 79, where it would seem to have been assumed that the lien would attach to a policy of insurance and a lease respectively.

In *In re London and Globe Finance Corporation*, [1902] 2 Ch. 411, Buckley, J., cited *In re Bowes and Jones v. Peppercorne*, Joh. 430, and said they had been regarded as well settling the law ever since that bankers and brokers have a general lien on securities in their hands as between themselves and the customer for the balance due from the customer to the banker.

The nature of the "securities" subject to the lien is further deducible from the condition that they must come to the banker's hands in his capacity as banker, in the course of banking business. Very possibly it is part of a banker's business to advance money, and any class of property may by proper means be made the subject of security. But save in the case of specific deposit as security, or by way of equitable mortgage, in which cases lien becomes immaterial, it is difficult to conceive how such things as leases or conveyances should come to the banker's hands in the course of his business as such. The better view would seem to be that the lien only

attaches to such securities as a banker ordinarily deals with for his customer, otherwise than for safe custody, when there is no question or contemplation of indebtedness on the part of the customer.

Whether a particular security is in the banker's possession for the purpose of being dealt with by him in his capacity as banker is a question of fact, depending partly on the general usage of bankers, and partly on agreement or course of dealing between the banker and the particular customer who owns the security.

It has been suggested that the classification is collection on the one hand, safe custody on the other. This is too sweeping, though collection is no doubt the primary idea of the banker's functions with regard to securities subject to the lien. The possession of anything essential to collection, though not itself to be collected, would clearly be covered by the collection to which it was essential. A bond which had to be produced whenever interest was paid would be subject to the lien if the bankers were instructed to collect the interest. Bonds being deposited with the banker in order that he might cut off and collect the coupons, the lien would probably attach to the bonds as well as the coupons; but not if the customer himself cut off the coupons as they became due; and, as to these latter, only if they were then handed to the banker for collection. If bonds redeemable at a fixed time or by drawings were deposited with the banker to be presented for payment at the due date, or in the event of their being drawn, the lien would attach. The case of debenture or stock certificates deposited with a bank which is to receive the interest for the customer seems doubtful. The possession of them would not seem to be essential or instrumental to the receipt of the interest, and would seem more consistent with mere safe custody until they should be required on a transfer. In *In re United Service*

Collection
and safe
custody.

CHAP. XX. *Company*, L. R. 6 Ch., at p. 217, James, L.J., appears to have considered that certificates deposited in such circumstances would be subject to the lien. Sir M. Chalmers expresses doubt, but inclines to the view above expressed, as being the natural inference from the transaction. (See "Questions on Banking Practice," 7th ed., question 1097.)

Lien on
money.

Money paid in to the banker's has been expressly stated by the House of Lords to be subject to the banker's lien. (*Currie v. Misa*, 1 A. C. 564.)

It is somewhat difficult to see how in ordinary cases money could be the subject of lien; it would be usually incapable of identification; or if ear-marked, would be either deposited for safe custody or as specific security, conditions equally excluding the idea of lien. And the application of the principle of lien to money paid in to the bank is complicated by the consideration that such money, when paid in, constitutes a mere debt of equivalent amount from the banker to the customer; and a debt is not a suitable subject for a lien. It seems a more logical view to attribute the banker's unquestionable right to retain a credit balance against a debt due from the customer to the doctrine and rule of law which authorises the setting off of one debt against another. In *Roxburghe v. Cox*, 17 Ch. D. 520, the Court of Appeal, while recognising that the banker's lien applied to money paid into the account, preferred to base their decision on this doctrine of set-off. If the lien applies to money, it would apply to money received for a cheque paid in for collection. In such case the money is unquestionably received by the banker in the course of his business as such. But here again the doctrine of set-off would as efficiently meet the banker's needs.

It must now be taken that the general lien extends only to the customer's own securities. The customer may be able to utilise negotiable securities, not in fact his own

by way of pledge, he may even be able to deposit other securities effectively because they have been left in his hands by the real owner, but the ground of the banker's claim is, in the first case, negotiability and value given, in the other, holding out; in neither is it legitimate lien, save in so far as that term expresses the right of a holder who has taken a bill as security not as absolute transferee. (Cf. Bills of Exchange Act, s. 27 (3).)

"The bankers cannot claim a general lien except upon the customer's own property." (Cozens Hardy, M.R., in *Cuthbert v. Robarts Lubbock & Co.*, [1909] 2 Ch., at p. 233.)

When Romer, L.J., in *Great Western Railway v. London and County Bank*, [1900] 2 Q. B. 464, speaks of the general lien affecting all negotiable securities, he is using the word "lien" in its looser meaning as signifying title as pledgee of a negotiable instrument, though even that was inapplicable in that particular case, the cheques being crossed "not negotiable" and taken from a person having no title.

As between the banker and his own customer, the lien may be excluded by express contract or by circumstances which show an implied contract inconsistent with lien.

What excludes lien.

Goods merely deposited for safe custody would clearly be exempt from lien.

As to bonds deposited for collection of coupons, see *ante*, p. 403.

Money paid in to meet specific bills accepted payable at the banker's, or for any other specific purpose and so accepted, would be immune. Securities for sale, or money wherewith to effect a purchase, would be exempt. (*Symons v. Mulkern*, 46 L. T. N. S. 763.)

So would securities deposited to cover a loan to purchase other securities, although the loan had been drawn against. (Cf. *Cuthbert v. Robarts Lubbock & Co.*, *ubi sup.*)

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Money paid in by a third person under mistake of fact cannot be retained by virtue of lien. (*Kerrison v. Glyn Mills & Co.*, 17 Com. Cases, 41 ; 28 Times L. R. 106.) See *post*, "Money paid by mistake."

There is no lien on the private account of a partner for an overdraft of his firm.

There is no lien for the amount of a current discounted bill, except where the customer is bankrupt.

Return of
securities.

When there is agreement or distinct understanding that securities are to be returned on fulfilment of defined conditions, no very distinct rule can be laid down as to what constitutes inconsistency with lien.

The question has generally arisen when securities have been deposited to cover specific advances, on repayment of which there has still been a balance due to the banker.

Apart from any special agreement, it was doubted in *Jones v. Peppercorne*, Joh. 430, whether the banker might not in such case assert his general lien. In *Wilkinson v. London and County Bank*, 1 T. L. R. 63, it was assumed throughout that a customer depositing securities as cover for specific advances was entitled to have them back on repayment of those advances, independent of the state of account between him and the banker. In *In re London and Globe Finance Corporation*, [1902] 2 Ch. 416, Buckley, J., held that securities deposited as cover for specific advances, but after discharge thereof left in the banker's hands, became liable to the general lien. In *In re Bowes*, 33 Ch. D. 586, a policy of life insurance was deposited with a bank with a memorandum stating it to be deposited as security for all monies then or thereafter due on balance of current account or otherwise, not exceeding in the whole at any one time the sum of £4000. The customer died indebted to the bank in more than £4000. North, J., held that the special agreement was inconsistent with a

general lien for the balance of £1000. This case and *Jones v. Peppercorne* were treated as establishing the law in *In re London and Globe Finance Corporation*, [1902] 2 Ch. 411. CHAP. XX.

The judgment of Buckley, J., was thus based on the ground that the securities, being consciously left in the banker's hands after satisfaction of the specific advances, might be regarded as having come into his hands anew in the way of business or as impliedly repledged or redeposited; and the better view seems to be that, even where not so expressed, securities deposited for specific advances can be claimed by the customer on discharge of those specific advances, although he may still owe money to the banker.

But the same rule does not apply to the proceeds of such securities when sold. (See *post*, "Realisation of Securities.") Distinction as to proceeds.

In *Akrokerri (Atlantic) Mines, Ltd. v. Economic Bank*, [1904] 2 K. B. 465, Bigham, J., uses words which might be taken to imply that collection is a special purpose inconsistent with lien. This is of course not the case. Collection is essentially in the way of a banker's business, and his lien over documents in his hands for that purpose has been repeatedly recognised. (Cf. *Currie v. Misa*, 1 A. C., at pp. 565, 569, 573.) Judgment of Lord Birkenhead, C., Buckmaster and Carson in *Sutters v. Briggs*, [1922] A. C., at pp. 16-18: "If bankers are not holders of cheques for which they are agents for collection, they derive no benefit from sect. 27, sub-sect. 3, as the sub-sect. does not apply even where there is a lien to a person who is not a holder." It has even been held that, in the absence of special notice, a clearing banker has a lien over bills remitted for collection by his correspondent in respect of a balance due from such correspondent, though the bills were the property of the latter's customer. (*Johnson v. Robarts*, L. R. 10 Ch. 505; *Ex parte Armitstead*, 2 G. & J. 371.) Collection not inconsistent with lien.

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Lien and
pledge.

Lien being the right to retain another man's property until a debt is paid, property and lien cannot co-exist in the same person with regard to the same article. The lien peculiar to a banker, with regard to negotiable securities, is defined in *Brandao v. Barnett*, 3 C. B., at p. 531, as "an implied pledge"; but, assuming this to be the case, absolute property is as inconsistent with the rights of a pledgee as it is with those of a person having a lien.

Merger.

If, therefore, the banker becomes holder in his own right of negotiable securities coming into his possession as banker, his right of lien or pledge is gone, or rather is merged in the higher rights of an independent holder for value.

Whether he holds under a lien or as holder for value in his own right, forged indorsement, or, in the case of a cheque, the not negotiable crossing, has precisely the same effect on his rights against parties to the instrument.

Duty to
present.

Where bills, notes, or cheques are in the banker's hands subject to the lien, it is his duty to present them at maturity and give notice of dishonour if they are not paid.

This obligation may be based either on his position as agent or as holder for value.

No right to
negotiate.

The *dicta* in *Thompson v. Giles*, 2 B. & C., at pp. 429, 432, as to the banker's right to negotiate bills held for collection or as security where the state of the customer's account renders it reasonable to do so, are too vague to be acted upon. The same remark applies to *Ex parte Barkworth*, 2 De G. & J. 194.

Separate
accounts.

Either by right of lien or set-off, a banker appears entitled to retain a credit balance on a purely private account against overdraft on any other account for which the customer is personally liable, though by reason of being earmarked or even fiduciary, the latter account is

itself exempt from lien or combination. Reasonable notice must, of course, be given before so doing, and cheques previously drawn must be honoured.

4. *Pledge*

It is not unusual to find classed under the head of lien cases where securities are definitely deposited as cover for a running account or for specific advances. The recognition of the banker's lien may no doubt be adduced as showing that it is part of a banker's business to lend money, and, in that sense, it might be said that the securities come into his possession in the course of his business. But the true conception of lien seems to be rather of its attaching to documents which come to the banker's hands by a process not directly connected with any overdraft or advance.

Where the security is professedly handed over for the purpose of securing an overdraft or an advance, the transaction is strictly of the nature of a pledge. Pledge.

With regard to bills, notes, or cheques, the distinction is immaterial. Probably the lien arising from contract mentioned in sect. 27, sub-sect. 3, was intended to refer to pledge. In any case the pledgee has the same rights. If he takes in good faith, he acquires an independent title and right to sue on the instrument to the extent of what is due to him, and to hold the instrument against the true owner until his claim is satisfied; except, of course, in the case of forged indorsement or "not negotiable" crossing. Such title does not, however, justify him in negotiating the instrument, at any rate unless the state of the customer's account renders this a reasonable thing to do. Negotiation in some circumstances is recognised in *Thompson v. Giles*, 9 B. & C., pp. 429, 432, and *Ex parte Barkworth*, 2 De G. & J. 194; but, apart from agreement, it is difficult to define such a state of Pledge of bills.

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affairs ; and negotiation would be an absolute departure from the usual practice, namely, to present the instrument at maturity and give notice of dishonour if it is not paid.

Pledge and transfer.

The dividing line between the pledge of a bill or note and its absolute transfer, equivalent to discount, is sometimes difficult to draw. The presumption in all cases of negotiation is in favour of absolute transfer, and this presumption is heightened when the transfer is by indorsement. The question is, however, one of fact, and the presumption is rebuttable. It may be shown, as laid down in *Ex parte Schofield*, 12 Ch. D. 337, that the indorsement was not by way of transfer, but merely by way of affording the additional security of the pledgor's name in a transaction which was really one of pledge only.

As to the complications which may arise where a "stiffening" indorsement is taken from a person not a party to the bill, see the bewildering series of cases starting with *Steele v. M'Kinlay* in 1880, 5 A. C. 754, down to *Macdonald v. Nash* in the Court of Appeal, July 27, 1922, when the Court differed in opinion.

Bill as collateral security no suspension of remedy.

A bill or note deposited as security or pledged to cover an advance or overdraft does not, as does a bill or note or cheque given for a debt, suspend the remedy for the debt. The two co-exist, run side by side, are in the true sense collateral. There is nothing in law to prevent a banker suing for an overdraft even during the currency of a note or bill at a fixed date which he has taken as security. (*Peacock v. Pursell*, 32 L. J. C. P. 266.)

Satisfaction of debt not payment of bill.

And satisfaction of the debt is not necessarily payment of the bill or note. To discharge a bill there must be payment in due course, which must be by or on behalf of the drawee or acceptor. Payment in due course involves payment to the holder. (Bills of Exchange Act, 1882, s. 59.) Application of monies by the holder himself,

however legitimate, does not constitute payment in due course. In *Jenkins v. Tongue*, 29 L. J. Ex. 147, the secretary of an institution had given a promissory note to secure an advance; part of the advance was stopped, with his consent, out of his salary. Held that this would not support a plea of payment *pro tanto* of the promissory note. In *Glasscock v. Balls*, 24 Q. B. D. 13, a promissory note was given to secure an advance, and property was mortgaged as further security. The mortgage was realised, and the mortgagee paid himself the advance out of the proceeds. The Court of Appeal were of opinion that this did not constitute payment of the promissory note. Whether payment direct by the borrower, but definitely made on account of the debt, not the security, would stand on the same footing, might be doubtful; but, assuming the basis to be the collateral, concurrent nature of the debt and the security, there would seem to be no valid distinction.

In *Glasscock v. Balls*, Lord Esher expressed himself as not being clear what were the rights of the pledgor in such a case. He suggested that he might be entitled to a perpetual injunction restraining the pledgee from negotiating or parting with the instrument.

Rights of
pledgor in
such case.

It is difficult to see why, on satisfaction of the debt, however made, the pledgor is not entitled to claim the instrument, like a redeemed pledge. It is only Lord Esher's silence as to this obvious course that suggests a doubt. If the note or bill is, after satisfaction of the debt, left in the pledgee's hands, a *bonâ fide* holder for value, taking it before it is overdue, can acquire a good title (*Glasscock v. Balls*, 24 Q. B. D. 13), and the satisfaction of the debt would be no defence against him when suing on the instrument.

A common form of security as cover is a promissory note payable on demand, that being a continuing security. But if such note be indorsed, it must be presented within

Promissory
notes as
cover.

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a reasonable time after indorsement to charge the indorser (sect. 86, sub-sect. 1). In estimating such reasonable time, the character of the instrument as a continuing security must be taken into account ; but that would not justify its being held over for any period during which the loan might be outstanding. Sir Mackenzie Chalmers suggests ten months as the limit, and this is probably the maximum.

Fully
negotiable
securities
as cover.

Fully negotiable securities, other than bills or notes, may be utilised as cover by deposit with or without an accompanying memorandum.

The lender becomes at once pledgee ; if he takes the instrument *bondâ fide* and for value, he acquires a title against all the world to hold it until the obligation it was given to cover is discharged. (*London Joint Stock Bank v. Simmons*, [1892] A. C. 201 ; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 121.) The test of good faith is the same as is applied in the case of the transferee of a bill. An antecedent debt forborne by express or implied agreement on deposit of the security is sufficient consideration. (*Glegg v. Bromley*, [1912] 3 K. B. 474.)

Fully negotiable instruments of this class, such as bonds payable to bearer, recognised as negotiable by the Stock Exchange and the mercantile community, are the best security a banker can get. No question of forged indorsement can arise ; and by their nature they give no scope for the danger attaching to bills that they may have been obtained by such fraud as excludes the contracting mind. A negotiable security of this class may be stolen from its true owner, and yet the pledgee, if he take it *bondâ fide* and for value, can hold it against him, as if it had been a bank note.

Absolute negotiability is a fixed quantity, admitting of no qualifications or degrees.

Taking
securities

For a short period a pernicious theory obtained that some sort of constructive notice affected the banker if he

took by way of pledge instruments, however fully negotiable, from an agent, such as a stockbroker.

That, however, was finally dispelled by the case of *London Joint Stock Bank v. Simmons*, [1892] A. C. 201. See also *Fuller v. Glyn Mills & Co.*, [1914] 2 K. B. 168; *Lloyds Bank v. Swiss Bankverein*, [1912] 18 Com. Cas. 79. The previous decision of the House of Lords in *Sheffield v. London Joint Stock Bank*, 13 A. C. 333, was the foundation of the pre-existing error above referred to. This decision was not unreasonably understood as laying down that if negotiable securities were tendered as cover by a person who, from the nature of his business, was likely to have securities of other persons in his hands, it was the duty of the bank to inquire into the nature and extent of his authority to deal with the securities; that the omission to make such inquiry might preclude the banker from the position of holder in good faith and for value; and further that, though the agent might have authority to pledge the securities of each principal separately, this would not avail the bank if the securities of various principals were pledged *en bloc* to secure one advance.

In *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, the House of Lords declared that *Sheffield v. London Joint Stock Bank* was decided purely on the particular facts of the case, which in their opinion were such as to affect the bank with either actual or legal notice of the limited right of property of the person with whom they were dealing, and of the fact that he was exceeding such right of property or any authority reposed in him, in pledging the securities as he did. They repudiated the idea that any new principle of law was laid down by that case, and emphatically affirmed the right of a bank or any other person to take as security negotiable instruments, even from a person known to be an agent, without the necessity of inquiring into his authority

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Lord Hals-
bury's views.

so to deal with them, provided always there were no extrinsic circumstances reasonably calculated to arouse suspicion. The guiding principle for bankers in dealing with brokers or other agents who, from the nature of their businesses, are likely to have in their hands securities belonging to their clients, must therefore be derived from *Simmons' Case* irrespective of any supposed general propositions which may have appeared deducible from *Lord Sheffield's Case*. Lord Halsbury, in *Simmons' Case*, expressly says that there is nothing in the position of broker and customer which makes it a reasonable inference that the broker is exceeding his authority, or raises a doubt on the subject; that the inferences arrived at in *Lord Sheffield's Case* have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. "The deposit of securities," he proceeds, "as cover in a broker's business, is as well known a course of dealing as anything can be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know that the banker could reasonably be expected to presume, that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client," [1892] A. C., at p. 211. He then says that in *Lord Sheffield's Case* no countenance was given to the notion that, because the pledgor was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt, and adds: "To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord*

Sheffield's Case would justify so novel an idea. The broad proposition laid down by Chief Justice Abbott in 3 B. & C. 47, that whoever is the holder of a negotiable instrument 'has power to give title to any person honestly acquiring it,' seems to me to be decisive of this case."

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Lord Herschell dwelt strongly on the absurdity which would result if negotiable securities could not be as readily taken by way of pledge from an agent as documents of title to goods are by virtue of the Factors Act. He said it was admitted that a good title to negotiable instruments could be acquired by purchase from an agent entrusted with them, and could see no reason why the case of pledge should stand on any different footing. "What ground," he says, "is there for the position that in regard to a pledge the case is different; that one may safely take a negotiable instrument by way of sale from an agent, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself to inquire into the nature of his title or the extent of his authority," *ubi sup.*, at p. 217.

Lord Herschell's views.

And at the conclusion of his judgment Lord Herschell sums up the whole matter in words which concede all that any banker could reasonably ask. He says: "I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation, after the event, of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculation.

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I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required, and I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them. Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different. The existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed, and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting," [1892] A. C., at p. 223.

It would be superfluous to comment on the position so clearly and satisfactorily stated, except to say that the main principle involved is in no sense restricted to the case of an agent, but applies just as much to that of a person who professes to deal with the securities as an independent owner. (Cf. *Jones v. Peppercorne*, Joh. 430.)

Documents
must be
negotiable.

But it must be borne in mind that all the rights and immunities accorded to the banker in the *Simmons' Case* were founded and dependent on the proved or assumed full negotiability of the instruments pledged to him. It is necessary, therefore, to consider what are the tests of negotiability.

Negotiable Instruments

To be negotiable, an instrument must fulfil the following conditions: It must embody a promise or ground of action in itself. (*Jones v. Coventry*, [1909] 2 K. B. 1029.) In the case of foreign Government bonds there is a promise but no enforceable ground of action.

(*Goodwin v. Roberts*, L. R. 10 Ex. 337.) It must purport to be, in its then condition, transferable by delivery ; it must, either by statute or by the custom of the mercantile community of this country, be recognised as so transferable and as conferring upon a person who takes it honestly and for value independent and indefeasible property in and right of action on it. (Cf. *per* Blackburn, J., in *Crouch v. Crédit Foncier*, L. R. 8 Q. B., at p. 381 ; *per* Lord Herschell in *London Joint Stock Bank v. Simmons*, [1892] A. C., at p. 215 ; and especially the lucid statement of the true rule by Bowen, L.J., in *Simmons v. London Joint Stock Bank*, [1891] 1 Ch., at p. 294.) Blackburn, J., says a negotiable instrument must be " transferable, *like cash*, by delivery," but, of course, he does not mean it must always pass at its face value. Few securities would fulfil that test. He is speaking merely of the method of transfer. The admission made in the *Simmons Case* was that the bonds in question passed from hand to hand on the Stock Exchange ; and Bowen, L.J., points out the difference between transferability and true negotiability, and that the admission was consistent with the bonds being transferable, but not legally negotiable. The House of Lords, [1892] A. C. 201, coupling this admission with a somewhat general statement made in evidence that the bonds so passed as " negotiable securities," held their legal negotiability proved. Lord Macnaghten, indeed, seemed desirous of minimising, or even obliterating, the difference between transferability and negotiability, by deprecating the setting up of " refined distinctions habitually ignored on the Stock Exchange," (P. 224.)

The inevitable and desirable extension of the category of negotiable instruments is probably better forwarded by the growing custom of merchants, exercised on a proper and intelligent basis, than by any such summary levelling of carefully defined and logical boundaries.

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How
negotiability
established.

It is sometimes said that the custom of the Stock Exchange is the only criterion of the negotiability of an instrument. No doubt the concentration in the Stock Exchange of dealings in all classes of securities renders that body a factor of ever-increasing importance in the determination of the question, and evidence from the Stock Exchange is the most available and carries the greatest weight in the courts; but there is no justification, certainly none in any of the earlier cases, for confining the recognition of negotiability to the Stock Exchange, to the exclusion of bankers, merchants, and other classes of the mercantile world.

Recent
recognition
sufficient.

The recent origin of a mercantile custom to treat a particular class of instrument as negotiable is no bar to its validity.

This is disputed by those who advocate the view that the negotiability of certain instruments was recognised by, and incorporated in, the ancient law merchant, and that, save by statute, no addition can therefore be made to the category.

The judgment of Kennedy, J., in *Bechuanaland Exploration Company v. London Trading Bank*, [1898] 2 Q. B. 658, in which the earlier and somewhat conflicting decisions are carefully reviewed, is very convincing in the opposite direction; and it was followed by Bigham, J., in *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144. Apart from authority, it hardly appears conducive to national prosperity that an important part of the circulating medium of the country should be once and for all limited to that which sufficed for the comparatively small commerce of earlier days, with no possibility of expansion to meet the larger needs of modern times.

Must be
negotiable
here.

The negotiability of a foreign instrument in the country of its origin is no evidence that it is negotiable here. As Bowen, L.J., said in *Picker v. London and*

County Bank, 18 Q. B. D. 515: "Is evidence that an instrument or a piece of money forms part of the mercantile currency of another country any evidence that it forms part of the negotiable currency in this country? Such a proposition is absurd; for, if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not show that it is a negotiable instrument here." (Cf. *Williams v. Colonial Bank*, 38 Ch. D., at p. 404.)

The instruments in *Picker's Case* were Prussian bonds issued with detached coupons. The evidence was that they were treated in Prussia as negotiable by delivery apart from the coupons, but it was not proved that they were so treated in the English market. The question has since arisen whether the absence of, say, one coupon not yet due, from an otherwise negotiable instrument, affects its negotiability. Moxon on Banking, 15th edit., p. 93, says it does. On the other hand, Mathew, J., in *Rothschild v. Commissioners, etc.*, [1894] 2 Q. B. 142, held coupons negotiable *per se*. He does not distinguish between those due and those accruing. It is conceivable that a man might wish to realise future coupons without parting with the capital. The independent negotiability of the coupons infers that of the bond without them, and it is understood that this is the view generally adopted on the Stock Exchange.

So-called Quasi-negotiable Securities

Outside the region of really negotiable securities one comes across the dubious doctrine of securities which are said to be or to have become negotiable by estoppel,

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or quasi-negotiable. Either term is misleading, the latter particularly so.

The true view is that expressed by Judge Willis (Negotiable Securities, p. 14): "Title by estoppel is what men mean when they speak of negotiability by estoppel, but title by estoppel is a different thing altogether from negotiability."

"Negotiable
by estoppel."

The phrase "negotiable by estoppel" is no doubt used by Bowen, L.J., in *Easton v. London Joint Stock Bank*, 34 Ch. D., at pp. 113-114; but he is most careful to explain that it is a mere convenient figure of speech, and that the real underlying principle is that of personal estoppel by conduct, representation, or holding out an agent as having certain authority, of which the instrument is an element or evidence; not the attribution of partial or fictitious negotiability to the instrument itself.

There is no case of this nature which is not either actually explained on this basis or is not so explainable.

Goodwin v.
Robarts.

In *Goodwin v. Robarts*, 1 A. C., at p. 489, Lord Cairns puts the position thus: "The plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand, and that anyone who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present would have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and, although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to anyone taking it, a representation

which the appellant must be taken to have made or to have been a party to, that, if the scrip were taken in good faith and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign Government; still the appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to anyone on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. My Lords, I am of opinion that, on doctrines well established, the appellant cannot be allowed to defeat the title which the respondents have thus acquired."

Varied in form and expression, that is really the substance of all the cases which have given rise to the theory of quasi-negotiability or negotiability by estoppel.

Bowen, L.J., in *Easton v. London Joint Stock Bank*, *ubi sup.*, though for convenience, as before stated, he uses the ambiguous term, clearly shows that the ground of his decision is the principle enunciated by Lord Cairns.

Bowen, L.J.,
on title by
estoppel.

He says (p. 113): "If these bonds are not strictly negotiable and do not possess the incidents of negotiable instruments which are recognised as such, nevertheless a further question arises: whether Lord Sheffield, by the way he has treated these bonds, has not estopped himself from denying their negotiability, whether he has not, by placing for disposal, and with the intention that they should be transferred, in the hands of an agent of his own, bonds which on their very face purport to create a liability quite independent of anterior equities between the company and the person who takes them, really

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chosen to treat these bonds as negotiable and to authorise his agent to treat them as such. If the negotiability of these bonds by estoppel, so to speak, arises, that disposes of all difficulty that would arise owing to the seal being attached to these bonds ; because it is no longer a question whether they are, strictly speaking, negotiable, but whether Lord Sheffield has chosen to treat them as such. This second way of looking at the matter may be dealt with from two points of view, but practically they run into one another. You may say that Lord Sheffield, having placed in the hands of his agents these bonds with the intention that they should be transferred beyond those agents and held his agents out to the world as clothed with authority to transfer them as negotiable, cannot afterwards, by any unknown dealing, or limitation of authority which he has conferred on his agents, prejudice those who took the bonds which have been so floated. Or you may say, which I think is a sound way of putting it, that as regards Lord Sheffield and the bank these bonds have become negotiable by estoppel, and therefore Lord Sheffield is precluded from saying the legal title to these bonds is not in the bank."

The same principle is briefly expressed by Lord Herschell in *Colonial Bank v. Cady*, 15 A. C. 267, at p. 285: " If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who has received it in good faith and for value."

Conditions
of estoppel
by conduct.

This same case of *Colonial Bank v. Cady* indicates certain constituents which must be present to render the representation effective or justify a person in acting on it so as to acquire title by estoppel. The instrument must be complete ; there must be no further formality required on the face of it to entitle the taker to full rights and

title. If, for instance, it is a blank transfer, it must, on the face of it, purport to pass *ipso facto*, in its then condition, and without the necessity of any further step, all rights and title to a person taking it *bond fide* and for value. (Cf. *Fuller v. Glyn, Mills & Co.*, [1914] 2 K. B. 168.) The possession of the agent must, taken in connection with the nature and condition of the instrument, be consistent only with intention on the part of the principal that the agent shall have power to transfer it by way of sale or pledge. Possession is not, as in the case of fully negotiable instruments, indicative of right to dispose of the instrument. If the agent's possession is ambiguous, is equally compatible with authority to transfer and another purpose, the taker has no right to assume the former. As Lord Halsbury points out in *Colonial Bank v. Cady*, *ubi sup.*, at p. 273, mere custody, apart from what the instrument, upon the face of it, represents to any person to whom it might be exhibited, is not a representation of authority to transfer. That only comes in when the document itself, in the condition in which it was entrusted to the agent, represents, by its being in that condition, that the agent is entitled to deal with it in the way he proposes to do. The real test is whether the principal has represented the agent as invested with disposing power. (*Per* Lord Halsbury, in *Farquharson v. King*, [1902] A. C., at p. 330.) It is liability by holding out, either holding out the instrument or the agent or both.

A somewhat analogous case is that of a person who entrusts another with title-deeds for the purpose of raising money on them for the principal's benefit. In such case the owner is estopped from disputing the title of any person who honestly lends money on the security, notwithstanding the agent utilised the deeds to borrow money on his own account and exceeded the limit imposed by the principal. (*Brocklesby v. Temperance*

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Building Society, [1895] A. C. 173 ; *Rimmer v. Webster*, [1902] 2 Ch. 163 ; *Lloyds Bank v. Cooke*, [1907] 1 K. B. 794 ; *Smith v. Prosser*, [1907] 2 K. B. 735.) The same principle is clearly enunciated with regard to an incomplete cheque in *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777.

Estoppel by
character of
document.

Estoppel of this character may arise from representation of the character of the document conveyed by its terms, apart from any question of agency.

If a company, for instance, choose to issue instruments, such as debentures, in a form whereby they bind themselves to pay the amount to bearer, they may be estopped by such representation from asserting any equities of their own affecting a previous holder, as against a person who has taken the instrument *bond fide* and for value on the faith of such representation. (See *In Re Imperial Land Company of Marseilles*, L. R. 11 Eq. 478.)

Theoretically the pledgee may part with the possession of the securities to a third party or even to the pledgor himself for a temporary specific purpose not involving or facilitating the creation of any conflicting right or interest, which purpose fulfilled, the securities are to be immediately returned to the pledgee, and so doing would not divest him of his rights. (Cf. *North-Western Bank v. Poynter*, [1895] A. C. 56.) It has even been held that he may re-pledge the securities so long as he does so only to the extent of his own interest and does not purport to pledge or charge the whole property. (*Halliday v. Holgate*, L. R. 3 Ex. 299.) But in any case parting with possession of the securities may well mean loss of them. The same conditions and characteristics which render them good in the banker's hands render them good in anybody else's hands as against the banker.

If they are negotiable, anyone who takes them *bond fide* and for value can keep them ; if not strictly negotiable, he can set up holding out.

Lloyds Bank v. Swiss Bankverein, 18 Com. Ca. 79; 29 Times L. R. 219, is an illustration and a warning. The bank lent money on bearer bonds to bill-brokers. The bank called in the loan. The brokers came and paid the loan by cheque and received back the bonds. The cheque was dishonoured. The bank sued the defendants, who had received the bonds *bonâ fide* and for value from the brokers. The alleged ground of action was that the bonds were impressed with a trust in favour of the plaintiffs. The Court of Appeal held that it was repugnant to the nature of negotiable instruments to seek to impress them with vendor's lien or implied trust, and that the plaintiff's claim failed. Farwell, L.J., said, "The bankers gave up the securities and took the broker's cheque, and the risk was theirs on the broker's cheque."

5. *Documents of Title to Goods*

Provided the banker is dealing with honest and responsible persons, documents of title to goods, such as bills of lading, delivery orders, warehousemen's certificates, dock-warrants and letters of lien or hypothecation, are convenient securities for advances. By means of them goods can be effectively pledged which obviously could not otherwise be so utilised by reason of their bulk or location. By bills of lading in especial, goods on the high seas can be hypothecated before arrival and thus used as cover for bills given for the price or for advances. Naturally, a very large proportion of this business is transacted through brokers and other agents of the owners of the goods, and the Factors Act, 1889, and the Sale of Goods Act, 1893, are praiseworthy efforts to minimise the banker's risk in dealing with such agents, and incidentally with quasi-owners, such as vendors who have already sold the goods elsewhere and vendees who may not be in a position to pass a good title to a subvendee or pledgee.

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The scheme of these Acts is not so much to elevate the various documents of title to the position of the banker's ideal security, the fully negotiable instrument, to which he acquires an indefeasible title, whatever the customer's position, whether the customer be honest or dishonest, whether the security be the customer's own or he has authority to deal with it or not, and whether the banker takes it for an existing debt or a fresh advance. They really amount to little more than an exposition and possible extension of the principle of holding out by entrusting documents of title to an agent or person in a fiduciary position. And, unfortunately, the provisions of the two Acts are so tangled, so overlapping, so complicated by cross-references and the idea of reducing everything to the common denominator of "the mercantile agent," that, for want of certainty, the safeguards are not so complete or reassuring as they were doubtless intended to be.

As above implied, neither of these Acts professes to apply or does apply where the person dealing with the goods is the actual owner. (Cf. *Inglis v. Robertson*, [1898] A. C. 616.)

The "person who has sold the goods," classed as a mercantile agent by the Factors Act, 1889, s. 8; Sale of Goods Act, 1893, s. 25 (1), is obviously a person who has sold the goods previously, but is enabled to deal wrongfully with them by reason of the vendee having allowed him to remain in possession of the documents of title.

The "person who has bought or agreed to buy the goods" (Factors Act, s. 9; Sale of Goods Act, s. 25 (2)) is the person who has got the goods or the documents under an incomplete or revocable sale or contract of sale.

Where the real owner and possessor is the person seeking an advance on the security of the goods, the pledge is not complete unless and until there has been actual or constructive delivery of the goods.

Pledge by
real owner.

Actual delivery to a banker is out of the question. CHAP. XX.
As to constructive delivery, it is incongruous to find that in many of the cases the ideal method of effecting such delivery is stated to be the handing over the key of the warehouse where the goods are stored, analogous to livery of seisin. Bowen, L.J., used the simile of such key even with regard to a bill of lading. The delivery of the key being an impracticable proposition in business matters, other methods had to be devised. Unreasonable as it may seem, the difficulty, where efforts have been made to effect direct constructive delivery from owner to pledgee, has been to avoid the operation of the Bills of Sale Acts; and, further, to get clear of the "order and disposition" clauses of the Bankruptcy Act. This precludes the otherwise obvious method of a delivery warrant, like a warehouseman's, being issued direct by the owner. In *Dublin City Distillery v. Doherty*, [1914] A. C. 823, the owners delivered documents of this nature to the pledgees. The House of Lords held that this was not actual or constructive delivery of the goods, and was within the Bills of Sale Act.

Lord Atkinson said (p. 847): "Delivery of a warrant such as those delivered to the respondent in the present case is in the ordinary case no more than an acknowledgment by the warehouseman that the goods are deliverable to the person named therein or to anyone he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned in some way to this person and agreed to hold the goods for him; then and not till then does the warehouseman become a bailee for the latter, and then and not till then is there a constructive delivery of the goods. The delivery and receipt of the warrant does not *per se* amount to a delivery and transfer of the goods."

The theory would seem to be that the same person cannot by one and the same operation transfer or pledge

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and attorn, and that the delivery orders, warrants, etc., excepted from the Bills of Sale Act, 1878, by sect. 4 as being used in the ordinary course of business only include those which operate through the intervention of a third party in possession of the goods, such as a warehouseman.

In such circumstances, both the owner's delivery order and the warehouseman's delivery warrant are, of course, within the exception. But, as pointed out by Lord Atkinson, the constructive delivery is only effective where both have been obtained.

As Lord Parker said in the same case, "Where the goods are not in the actual possession of the pledgor, but of a third party as bailee for him, possession is usually given by a direction of the pledgor to the third party requiring him to deliver them to or hold them on account of the pledgee, followed either by actual delivery to the pledgee or by some acknowledgment on the part of the third party that he holds the goods for the pledgee. The form in which such direction is given is immaterial. When the third party is a warehouseman, the direction usually takes the form of a delivery order and the acknowledgment of a warrant for the delivery of the goods or an entry in the warehouse books of the name of the pledgee as the person for whom the goods are held" (p. 852).

This difficulty in the way of the owner's being in a position to pledge goods in his own possession has been circumvented by the institution of letters of lien or letters of hypothecation.

The distinction seems a narrow one, but it is clear that an owner, though he cannot himself pledge, may, by agreement, change his possession into that of bailee for the pledgee, and that the instrument constituting him such is "one used in the ordinary course of business as proof of the possession or control of goods" within the exception of the Bills of Sale Act, and takes the

goods out of his "order and disposition." One might originally have doubted this, but there is the authority of Lord Mersey that such documents evidence a transaction of the most ordinary kind as between bankers and merchants and that such transactions happen by the score every day in places of business like Manchester. The words "we hold on your account and under lien to you," which usually occur in these documents, may be taken to have the effect of converting the possession of the owner into that of a bailee from the pledgee. Or the letter of lien may be regarded as an equitable agreement to pledge subsequently. Suffice it that the validity and efficacy of such instruments is now fully acknowledged. (*Ex parte North-Western Bank, re Slee*, L. R. 15 Eq. 69 ; *In re Hamilton Young & Co.*, [1905] 2 K. B. 772.) They are subject, however, to being defeated by any person who, without notice, acquires a legal title to the goods. Departure from usual form would seem dangerous, because it might remove the instrument from the category of those used in the ordinary course of mercantile business, and bring it within some definition requiring registration as a Bill of Sale. Thus in *In re Townshend*, 15 Cox 466, a hypothecation note given to bankers undertaking to hold goods in trust for them and to hand over the proceeds when received, was held to be a bill of sale as "a declaration of trust without transfer," the goods not being at sea.

Valuables already in the banker's hands for safe custody could, no doubt, be utilised as security by the customer giving a written memorandum of charge evidencing the banker's change of position with regard to them.

Bills of Lading

The Factors and Sale of Goods Acts include bills of lading with other documents of title to goods, as if standing on the same footing. But they have always

Bills of
lading not
negotiable.

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been recognised as holding an exceptional, if not clearly defined, position.

Question of
negotiability.

Opinions have differed as to whether they have any, and what, intrinsic negotiability of their own. The special verdict on the second trial of *Lickbarrow v. Mason*, 5 T. R. 863, found that, by the custom of merchants, they were "negotiable and transferable by the shipper's indorsement," but the interpretation of a legal term used in a verdict must always be somewhat doubtful, and, as Bowen, L.J., said (13 Q. B. D., p. 173), "the words of the special verdict in *Lickbarrow v. Mason* admittedly overstate the law." The interesting criticisms of Lord Blackburn on that case in *Sewell v. Burdick*, 10 A. C., at p. 98, raise considerable doubt whether the judgment delivered by Lord Loughborough in the Exchequer Chamber was ever reversed on its merits, and that judgment in the plainest terms denied the negotiability of bills of lading.

Though subsequently criticised, the judgment delivered by Lord Campbell in *Gurney v. Behrend*, 3 E. & B., at p. 633, is by many regarded as setting forth the true view. In it he says: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bond fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bond fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The Bills of Lading Act, 1855, gave a right of action on the bill of lading to the "indorsee to whom the property in the goods shall pass," but it is generally assumed that it did not invest the instrument with any additional degree of negotiability.

The view expressed in former editions of this book that probably the only exceptional feature akin to negotiability possessed by bills of lading is their acknowledged capacity to defeat the unpaid vendor's right of stoppage *in transitu* when transferred with authority to a *bonâ fide* transferee for value, is confirmed by Scrutton on Charterparties, 1917 edit., p. 162, note (*m*): "The only case in which the indorsee gets more than the indorser has (whether it can be called 'a better title' is a nice question) is in the case where a previous vendor's right of stoppage *in transitu*, valid against the indorser, is not available against the indorsee. Hence the phrase of that most learned Judge, Sir James Shaw Willes, that negotiable instruments 'include bills of lading as against stoppage *in transitu* only.'"

If bills of lading were fully negotiable there would be no need for their being included with other documents of title to goods in the Factors Act, 1889, and the Sale of Goods Act, 1893.

Factors Act, 1889. Sale of Goods Act, 1893

These two Acts are set out and interpreted, so far as interpretation is possible, by Sir Mackenzie Chalmers in his "Sale of Goods Act, 1893," 9th edit.

With regard to documents of title to goods, the two Acts have to be read together; a peculiar feature being that sects. 8 and 9 of the Factors Act, 1889, are reproduced, in somewhat fuller form, by sect. 25 of the Sale of Goods Act, 1893, without being repealed; the reason assigned by Sir Mackenzie Chalmers being that the repeal was omitted in the later Act in order that the draftsman of

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the earlier one might be consulted and the matter dealt with some day by a Statute Law Revision Act. The same reduplication occurs in sect. 10 of the Factors Act, 1889, and sect. 47 of the Sale of Goods Act, 1893.

Another clue to the labyrinth of these particular provisions may be derived from the judgment of the Court of Appeal in *Cahn v. Pockett's Bristol Channel Packet Company*, [1899] 1 Q. B. 643.

Fresh difficulties are, however, introduced if the rule laid down by the House of Lords in *Inglis v. Robertson*, [1898] A. C. 616, is to be strictly followed.

That rule inculcates that the provisions of the Factors Act, 1889, shall be treated as limited by the headings under which they occur; that those, for instance, included under the heading, "Dispositions by Mercantile Agents," must be confined to dealings by persons answering that description.

The construction of the Act, which only states the effect of dealings by persons other than mercantile agents by assimilating such dealings to those of a mercantile agent, renders absolute adherence in all cases to this rule impossible; and it seems probable that it was originally only directed to preventing isolated sections, such as sect. 3, general in their terms, from being utilised by persons and in circumstances altogether outside the purview of the Act.

Documents of
title to goods.

The Acts make no distinction between the various classes of documents of title to goods, which they define as "including any bill of lading, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented." (Factors Act, 1889, s. 1 (4); Sale of Goods Act, 1893, s. 62.)

The general design of the Acts is to protect persons dealing *bonâ fide* and for value with others of specified classes, on the faith of their possession of documents of title to goods, such possession being primarily indicative of ownership of, or authority to deal with, the goods. The classes specified, as previously stated, do not comprise actual owners. The basis of inclusion in the classes is a position which, occupied by A. with the consent of B., enables A. to obtain money or money's worth from C. by utilising the documents wrongfully or in excess of authority.

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Design of
the Acts.

The type and standard is "A mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." (Factors Act, 1889, s. 1.)

The
mercantile
agent.

The other classes include :—

Vendor and
vendee.

- (a) A person who has sold the goods. (Factors Act, 1889, s. 8 ; Sale of Goods Act, 1893, s. 25 (1).)
- (b) A person who has bought or agreed to buy the goods. (Factors Act, 1889, s. 9 ; Sale of Goods Act, 1893, s. 25 (2).)

This latter class (b) does not include a person holding goods under a hire-purchase agreement which gives him an option to purchase or not, although, if he do not purchase, he forfeits both goods and previous instalments of payment. (*Helby v. Matthews*, [1895] A. C. 471 ; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K. B. 244.) It does include such person if the agreement absolutely or even conditionally binds him to buy. (*Lee v. Butler*, [1893] 2 Q. B. 318 ; *Martin v. Whale*, [1917] 2 K. B. 480.)

The possession of the goods or documents of title by the mercantile agent must either be with the consent of the owner (Factors Act, 1889, s. 2 (1)), or it must have originally been with such consent, and the person dealing with the mercantile agent must not have notice of with-

Possession of
the agent.

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drawal of that consent (*ib.*, s. 2 (2)) ; or the documents of title must have been obtained by reason of the mercantile agent's being, or having been, with the consent of the owner, in possession of the goods represented thereby, or of other documents of title to the goods (*ib.*, s. 2 (3)).

Possession of
the vendee.

The possession of the vendee or person who has agreed to buy must have been obtained with the consent of the seller. (Factors Act, 1889, s. 9 ; Sale of Goods Act, 1893, s. 25 (2).) So again, here, the person who has bought or agreed to buy the goods is distinguished from an absolute purchaser in possession thereof.

As Collins, L.J., says in *Cahn v. Pockett's Bristol &c. Company*, [1899] 1 Q. B., at p. 658 : " Possession of, not property in, the thing disposed of is the cardinal fact."

The element of consent must, however, be present at least in the original acquisition of possession. " The Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods or documents, or otherwise got possession of them without the consent of the owner." (Collins, L.J., *ubi sup.*, at p. 658.)

Consent ob-
tained by
fraud.

The consent will be good enough notwithstanding it may have been fraudulently obtained, provided the fraud did not amount to larceny by a trick.

As Collins, L.J., says : " If a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent, he is able to pass a good title to a *bonâ fide* purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny

by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser." (*Cahn v. Pockett's &c. Company, ubi sup.*, at p. 699; approved in *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K. B. 50; cf. *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221.)

The delimitation of larceny by trick is thus defined by the Court of Appeal:

"If, as the result of a trick, the person defrauded intended to part with both the possession and the property in the goods, the offence is false pretences, but if he is induced to merely part with the possession of the goods and does not intend to part with his property therein, the offence is larceny by trick." (*Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463.)

The distinction is much the same as that between void and voidable contracts as affecting the property in a bill, referred to under the heading "Void and Voidable Instruments."

No sale, pledge, or other disposition made by a mercantile agent is protected by the Act unless he was at the time acting in the ordinary course of business of a mercantile agent. The protection, however, implies general authority in a mercantile agent to sell or pledge, and cannot be restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. (See *Oppenheimer v. Attenborough, ubi sup.*) Good faith and an absence of notice of want of authority in the agent are essential in anyone dealing with a mercantile agent.

Ordinary
course of
business.

Consideration is necessary to support any transaction under the Acts. Consideration is defined by sect. 5 of the Factors Act, 1889; and the enumeration of what may constitute it concludes with the general words "or any other valuable consideration."

Consideration.

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Primarily, and inferentially from the exception to be presently referred to, this would include an existing debt, forbearance to sue for which was expressly or tacitly stipulated for on the deposit of security.

Pre-existing
debt.

Sect. 4 of the Factors Act, 1889, however, precludes a pre-existing debt as consideration, at any rate where the person dealt with is a mercantile agent. It provides : " Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."

In terms this section only applies to pledges of the actual goods.

Sect. 3 says : " A pledge of the documents of title to goods shall be deemed to be a pledge of the goods." Both sections occur under the same heading, and, presumably, the pledge of documents by a mercantile agent comes under sect. 4 as well as a pledge of the goods themselves.

In the case, then, of pledge of documents or goods by a mercantile agent for an antecedent debt, the banker's remedy, if the agent was exceeding his authority, would be limited to the equivalent of the agent's actual rights against his principal, probably some trivial claim for charges or expenses.

Case of
vendors.

It has been suggested, however, that the restriction does not apply to vendors, and that is probably correct. Where a vendee, however, pledges goods for an antecedent debt, the pledgee's remedy is probably limited as if he were simply a mercantile agent. If it was the documents the vendee so pledged, the pledgee might defeat the vendor's lien or right of retention by sect. 10 of the Factors Act, 1889, or sect. 47 of the Sale of Goods Act, 1883.

Subject to the foregoing conditions, exceptions, and

doubts, any sale, pledge, or other disposition of the goods or documents in their possession by the parties described, is to have the same effect and validity as if made with the authority of the owner, vendor, or other person competent to give such authority.

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Sect. 10 of the Factors Act, 1889, and sect. 47 of the Sale of Goods Act, 1893, deal somewhat more specifically with the question of the vendor's lien and right of stoppage *in transitu*, and the effect of a transfer of the documents of title in defeating them.

Stoppage *in transitu*.

Lien.

Under sect. 47 of the Sale of Goods Act, 1893, re-enacting in somewhat fuller terms sect. 10 of the Factors Act, 1889, "Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

Lien and stoppage *in transitu*.

The distinction between this section and sect. 25 (2) of the same Act and sect. 9 of the Factors Act, 1889, which deal with the vendee or person having agreed to buy, is a minute and ambiguous one. For this and other dubious questions arising under the two Acts, the reader is referred to Sir Mackenzie Chalmers' Sale of Goods Acts, 9th edit. (1922).

It will be noticed that sect. 47 of the Sale of Goods Act, 1893, expressly recognises the utilisation of bills of lading and other documents of title by way of pledge as well as absolute transfer, and formulates the rights arising out of such pledge, following the lines laid down in *Sewell v. Burdick*, 10 A. C. 74.

Pledge of bill of lading.

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Liability
for freight.

As shown by that case, the liability for freight, and other liabilities which, under the Bills of Lading Act, 1885, s. 1, attach to "every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement," do not attach to one who takes the bill by indorsement and delivery by way of pledge for a loan; inasmuch as the absolute property does not pass to him, but only a special property.

Documents
as cover for
acceptances.

Documents of title to goods, particularly bills of lading, may be utilised as security for bills which the banker has agreed to accept and accepted for the customer. The usual method, as exemplified in *Banner v. Johnston*, L. R. 5 H. of L. 157, is for the banker to furnish the customer with a letter of credit, authorising him to draw to a specified amount against shipments or bills of lading, and undertaking to accept bills so drawn, provided the documents accompany the bills.

The customer is enabled to show this letter of credit to those from whom he desires to purchase, and so get credit for his drafts. But to ensure acceptance, the shipping documents or other documents of title must accompany the bill, or reach the bankers before or at the time when they are called upon to accept. The combination of these terms in a letter of credit, shown to the person who parts with his goods on the faith of it, does not constitute any right in him, or any other holder of the bill, to the goods. As Lord Cairns says, in *Banner v. Johnston, ubi sup.*, at p. 174: "The two arrangements are perfectly separate in their nature, namely, the arrangement or promise to accept the bills, which promise is to be shown to the parties selling the cotton, and the order from the bankers to those dealing with the cotton at Pernambuco to send home the shipping documents. The order to send home the shipping documents and the condition annexed to the promise to accept, that

the shipping documents shall be sent to them, are for the protection of the bankers, and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange.”

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The degree of property which the banker acquires by possession of the documents would probably depend on the purpose for, and arrangement under, which he received them. Cases of sale like *Shepherd v. Harrison*, L. R. 5 H. of L. 116, where the absolute property necessarily vests in the acceptor on his accepting the bill, do not stand on the same footing as cases where the goods are only to constitute security.

Degree of property acquired by banker.

In *Banner v. Johnston*, the expression is that on acceptance “the cotton passes into the hands of the bankers themselves.”

In *Ex parte Brett*, L. R. 6 Ch. 841, it is implied that where a person accepts bills, not being under actual liability to do so, on having bills of lading transferred to him, those bills become part of his estate, though he can only hold them as security for the liability he incurs on behalf of the drawer. Probably there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein, the acceptor’s interest extending to justify anything necessary for his protection or indemnity. (See Chalmers on Bills of Exchange, 8th edit., p. 343. Contrast *The Odessa*, [1916] A. C. 145, with *The Prinz Adelbert*, [1917] A. C. 586.)

If the banker do not accept the bill of exchange he has no right to keep the bill of lading or other document of title, and no property in the goods passes to him. (Sale of Goods Act, 1893, s. 19, sub-s. 3; cf. *Cahn v. Pockett’s &c. Company*, [1899] 1 Q. B. 643; *Guarantee Trust Company v. Hannay*, [1918] 2 K. B. at p. 664; cf. *The Orteric*, [1920] A. C. 724, 733.)

Banker not accepting bill.

As between the banker and the customer, an undertaking to forward bills of lading against acceptance will

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give the banker who has accepted the bill an equitable claim to the bill of lading, equivalent to a valid hypothecation of it, which would hold good against the customer's trustee in bankruptcy. (*Lutscher v. Comptoir d'Escompte*, 1 Q. B. D. 709.)

But as against third parties, it would seem that nothing short of possession of the documents, or at least constructive possession of them, as by their having been posted to the banker, will give him a good title to the goods.

Bills drawn
against goods.

It is not uncommon to find on the face of a draft mention of a cargo or credit against which it is drawn, such as "Against credit No. 20." "Pay to my order £100, which place to account cargo per 'Acacia.'" "Pay A. or order £1000, and place the same to account cotton shipments as advised."

It would appear that this does not create a charge even in favour of the drawee who accepts. (See *per Cotton, L.J.*, in *Phelps v. Comber*, 29 Ch. D., at p. 819.) The remarks of Mellish, L.J., in *Robey v. Ollier*, L. R. 7 Ch., at p. 699, that "A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed," though primarily directed to the case of an indorsee, seems of general application.

Such a statement on the face of a bill clearly gives no claim on the goods to holders of it, in case of dishonour of the bill. (*Inman v. Clare*, Joh., at p. 776; *Banner v. Johnston*, L. R. 5 H. of L. 157; *Robey v. Ollier*, *ubi sup.*; *Ex parte Dever*, 13 Q. B. D., at p. 777.) The authority of *Frith v. Forbes*, 4 D. F. & J. 409, so far as it militates against this rule, was displaced by *Brown v. Kough*, 29 Ch. D. 848.

Position of
acceptor.

A bank which has, under a letter of credit, accepted bills in this form is, therefore, not in any sense a trustee for the holders of those bills, with respect to the goods or securities pledged as security, and the bill-holders

have no right to question the bank's dealings with such goods or securities. (See *per* Lord Hatherley, in *Banner v. Johnston*, *ubi sup.*, at p. 168.)

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The drawer of the bill may, however, by formal agreement, apart from the bill, transfer his remaining rights in the goods or securities to a specific person, who may be the holder of the bill. Such assignment, however, cannot affect the rights of the acceptor to raise the money for payment of the bills if so provided, or, in any event, to indemnify himself out of the goods or securities deposited with him; it only gives the transferee the same right as the drawer possesses, namely, to require that the goods and securities should be applied to the payment of the bills, independent, to that extent and no further, of the general lien or right of set-off.

Assignment
of rights by
drawer.

The rule in *Ex parte Waring*, *ubi inf.*, which is an apparent exception to the rule that a bill-holder, as such, has no claim on the goods, though mentioned on the bill as being drawn against, is in no way inconsistent therewith. That rule is in no sense derived from contract, but simply from the necessities of adjusting in Court the equities between two insolvent estates, both of which are liable to the bill-holder, and one of which holds goods or securities of the other's as cover for the bills. (See the note by Sir M. Chalmers, "Bills of Exchange," 8th edit., p. 350.) In fact, in the original case of *Ex parte Waring*, 19 Ves. 345, there was no reference whatever on the bill to the goods against which it was drawn; and the same was the state of facts in other cases which were decided on the authority of that case.

Ex parte
Waring.

Even where the holder of the bill of exchange has had the bill of lading with it, he will not be entitled to claim specific appropriation of the goods to the acceptance, if he took the bill of lading with notice of the acceptor's right to have it on acceptance. In *Ex parte Dever*, 13 Q. B. D. 766, the letter of credit provided

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that the bills of lading were to accompany the bills of exchange, but were to be surrendered to the acceptors against their acceptances. This had been shown to the holders, and the bills referred to it. The bills of lading having accompanied the bills and having been delivered up to the acceptors on acceptance, it was held that the holder could not claim any specific appropriation of the goods to meet the acceptances, the acceptors having failed.

Bills payable
on delivery
of documents.

A bill accepted conditionally, payable on delivery of the bill of lading, has much the same effect as if the acceptor held the bill of lading. The acceptor incurs no liability unless the bill of lading is tendered to him before or at the time of presentment for payment. The acceptor gets, in a sense, a security for his acceptance on the goods, and at the same time this does not interfere with the holder having the bill of lading with the bill, and so obtaining a security on the goods in case the bill of exchange is dishonoured. (*Ex parte Brett*, L. R. 6 Ch., at p. 841.) Of course, such an acceptance is a qualified one (*Smith v. Vertue*, 30 L. J. C. P. 56), and the drawer and indorsers prior to acceptance would be discharged under sect. 44 of the Bills of Exchange Act, unless they had expressly or impliedly authorised the holder to take a qualified acceptance, or subsequently assented to his having done so.

Documents
on due date.

If the acceptor requires the bills of lading to be delivered to him on the day the bill falls due, as he very possibly might in order to carry out a sub-sale, he must clearly specify this in his acceptance; if the acceptance is in the form "Payable on delivery up of bills of lading," the acceptor is not discharged by the bills of lading not being tendered prior to or on that day. (*Smith v. Vertue*, 30 L. J. C. P. 56.)

The holder or banker on his behalf, who presents for acceptance or payment a bill with bill of lading or

other documents attached or accompanying, does not guarantee or represent the genuineness of either bill, bill of lading or other document or the existence of the goods, although the latter are referred to on the face of the bill. (*Guarantee Trust Co. v. Hannay & Co.*, [1918] 2 K. B. 623.)

In that case the following problem was raised, but not decided :

Question of
sect. 72.

A man has negotiated to him in this country a foreign instrument drawn on England to which a bill of lading is attached. This instrument is in form a regular, valid bill by English law, but owing to its method of allusion to the goods it is, by the law of its place of issue, not a negotiable bill, but only an equitable assignment. He presents the document for acceptance. It is accepted. He presents it for payment, and it is paid. It turns out that the bill of lading was forged by drawer, there are no goods to answer it or the reference on the instrument, and the instrument was fraudulently issued. Holder took it for value and in good faith and there is no question of forged indorsement.

The Court said holder could have sued acceptor if the bill had been dishonoured under sect. 72 (1) (b), and recognised the incongruity that would arise if acceptor, having paid, were entitled to recover the money back from the holder, but suggest no solution of the puzzle.

It was not necessary to determine the question ; the Guarantee Trust Co. having negotiated the bill after acceptance, it was ultimately paid to the London City and Midland Bank, the holders at maturity. It is submitted that, if the question arose in direct and concrete form, no Court would countenance the absurdity of acceptor paying with one hand and taking back with the other, but would either interpret sect. 72, 1 (b) as implying in the right to sue the right to keep the money when paid without action, or would treat the case as one of payment on a negotiable instrument (see *post*, "Payment by Mistake"),

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the instrument being such, namely, a bill, by the law of this country, where payment was made, or would hold it an English bill *ab initio*, being drawn on England in English. (See *Re Marseilles Co.*, 30 Ch. D. 598.)

Parts of bills
of lading.

As to the inconveniences and risks involved by the custom of giving bills of lading in more parts than one, see the remarks of Lord Cairns in *Glyn v. East and West India Dock Co.*, 7 A. C., at pp. 599, 600, and of Lord Blackburn, at p. 605. Lord Cairns suggests that any person advancing money upon a bill of lading, and seeing, as he would, that it had been signed in more parts than one, should insist on all the parts being brought in. Lord Blackburn recognises the difficulty of a banker enforcing such a demand without offending his customer, but the practice of London bankers is to require the full set or a proper indemnity. (Questions on Banking Practice, 7th edit., Q. 608.)

*Change in Character of Parties affecting Deposit of
Securities*

Strictly speaking, if any change occurs in the constitution of the body holding securities for advances, further advances would not be covered by those securities. Theoretically they were deposited to cover debts due to a specific body of persons, and are, therefore, not available for obligations contracted with what in law would be a distinct entity. (*Per* Lord Eldon, C., in *Ex parte Kensington*, 2 V. and B. 83; Lindley on Partnership, 7th ed., p. 139.)

Joint Stock
companies.
Absorption.
Amalgama-
tion.

The mere alteration of the composition of a joint stock company or corporation would of course have no such effect, inasmuch as the body remains the same; nor would the absorption into it of smaller concerns if their identity were completely sunk. (*Capital and Counties Bank v. Bank of England*, 61 L. T. N. S. 516; *Prescott, Dimsdale & Co. v. Bank of England*, [1894],

1 Q. B. 351.) If it were the bank to which the securities were given which was absorbed, the securities would hold good to the absorbing bank for existing, but not for future, advances.

Bradford Old Bank v. Sutcliffe was the case of a guarantee. The guaranteed bank was absorbed, and it was contended that this discharged the guarantors, the principal having accepted the new bank as his creditors. The Court held this was not so, Pickford, L.J., saying: "There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must effect a material alteration in his position. . . . Where the liability is ascertained it is matter of no consequence to the surety to whom he has to pay it" ([1918] 2 K. B., at p. 842). So, in the same case, Bankes, L.J., says the creditor may assign his debt or his securities without releasing the surety. The principle appears to cover an analogous dealing with any securities. (See also *In re Smith*, 2 M. D. & De G. 314.) But it is only applicable where the debt is existing and ascertained, that is up to the time of the absorption. See *post*, "Guarantees."

The same would be the result of amalgamation as distinct from absorption: the securities could only be relied on for outstanding advances at that date.

The danger of parting with the securities even for temporary purposes has been dealt with before (p. 424). In the case of documents of title to goods there is the additional risk that the Factors or Sale of Goods Acts may operate against the banker by vesting a good title in a third party.

Again, a security may cease to be effectual as cover for further advances by reason of a change in the personality of the borrower. A change in the firm depositing

Change in
character of
borrower.

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the security might have this effect (*Bank of Scotland v. Christie*, 8 Cl. & Fin. 214) ; and in a case cited in Lindley on Partnership, 7th ed., p. 139, a person deposited deeds as security for advances to be made to him, and it was held that the security did not cover advances made to him and his partners.

Provision
against in
memoran-
dum.

Both these contingencies should therefore be provided for in any memorandum of deposit where future advances are contemplated ; or when such change takes place and is not provided for in a memorandum, the matter should be put on a proper footing. As pointed out by Lord Lindley, *ubi sup.*, at p. 140, an equitable mortgage by deposit may be readily extended, even by parol, to cover advances made after a change in the firm or body with which the securities are lodged, or may be turned into a continuing security for the obligations of a firm in which a change has taken place.

CHAPTER XXI

REALISATION OF SECURITIES

THE banker may find himself under the necessity of resorting to his securities to recoup himself the monies advanced.

The method to be adopted must depend on the nature of the securities and the capacity in which the banker holds them.

The remedy on bills, notes, or cheques held either under the banker's lien or under direct pledge as collateral security, is easy and practically automatic, the person having the lien or the pledgee being in the position of holder for value and entitled to sue thereon in his own name. Bills, notes,
and cheques.

A mere lien gives no power of sale, and no ground for applying to a Court to grant such power. The only method of realising securities held under such lien would seem to be by recovering judgment for the debt and then taking the securities in execution. An exception exists where the rules of the Stock Exchange attach a power of sale to the lien. (*Foster v. Bernard*, [1916] 2 A. C. 160.) Lien.

But in *Brandao v. Barnett*, 3 C. B., at p. 531, Lord Campbell defines the banker's lien as an implied pledge.

It has been generally understood that the banker's lien conferred rights more extensive than ordinary liens, and adopting Lord Campbell's view that it is an implied pledge, the ordinary remedies of a pledgee would appear to apply, where appropriate to the character of such securities, to securities held under the lien.

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Pledged goods
or documents
of title to
goods ; sale.

The rights of a pledgee are briefly as follows :—

Where goods have been pledged, either actually, or constructively by means of the documents of title, or where negotiable securities have been pledged, as by deposit, with or without a memorandum, the pledgee has on default a power of sale without the necessity of resorting to any Court of Equity.

An expression of opinion which might be interpreted to the contrary is found in the words of Lord Herschell in *North-Western Bank v. Poynter*, [1895] A. C., at p. 69, where he says as follows : “ In the paragraph from which I have quoted these words it is pointed out that a pledge gives only a right of detention of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee : he has a right which a mere pledge does not convey.” The paragraph quoted was from a text-book on Scotch Law ; the power of sale, as shown by the terms of the memorandum from the bank, set out at p. 57, accepted as the basis of the transaction by the borrowers (see p. 58), was “ an immediate and absolute power of sale,” independent of any default ; and it must be either to Scotch Law or to this exceptional right of sale that Lord Herschell was really referring. He seems to emphasise the word “ absolute.”

Authorities
for power of
sale.

The authorities for the power to sell on default appear conclusive.

In *Burdick v. Sewell*, 13 Q. B. D., at p. 174, Bowen, L.J., says : “ The pledgee of goods is entitled to sell them upon default.”

In *In re Morritt*, 18 Q. B. D., at p. 232, Cotton, Lindley, and Bowen, L.JJ., say : “ A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general

property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale.”

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Where the debt is repayable at a fixed date, the default occurs on non-payment at that date, but notice to the pledgor of intention to sell is apparently also necessary.

What is default.

Where the advance is for an indefinite period, demand of payment, with notice that if not complied with within a certain reasonable time the securities will be sold, is sufficient. In *Shillito v. Hobson*, 30 Ch. D., at p. 403, Fry, L.J., says: “The pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed if there be a time fixed, or in default of payment after reasonable notice if no time be fixed.” The proposition in *In re Morritt*, above quoted, is in no wise limited to pledges for advances repayable at a fixed date. *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, is a definite recognition of the principle, but suggests that the notice ought to fix a definite day, at a reasonable future date, for repayment to obviate sale. From this case it would appear that when the transaction is strictly pledge a month’s notice would be sufficient.

If the pledge does not realise sufficient to cover the debt, the balance of the debt is still recoverable.

The pledgee’s only remedy is by sale; he is not entitled to apply for foreclosure with a view to acquiring the absolute property in the pledge. (*Carter v. Wake*, 4 Ch. D. 605.)

The position of a banker who holds bills of lading, or other documents of title to goods, as cover for his acceptances of a customer’s bills, and who has obtained the warehouseman’s certificates or other evidence of the attornment of the bailee, where necessary, is as follows. He is a pledgee of the goods, the consideration for the pledge being the liability he assumes on the bills at the

Where held as cover for acceptances.

CHAP. XXI. customer's request, and the object of the pledge being his indemnification against that liability.

If the matter stands simply thus, there is no particular event which constitutes a default entitling the banker to realise. Either a default is inferred from the banker having to pay, or a power of sale is implied after he has so paid, as being essential to his indemnity. It is beyond question that, having paid, he can realise his security. (Cf. *Banner v. Johnston*, L. R. 5 H. of L. 157.) In that case there are references to the banker's selling in order to put himself in funds to pay the bills. These must be read in the light of the particular facts of the case, namely, that the drawers had agreed that the bankers should be kept out of cash advances, which, as pointed out by Lord Hatherley at p. 167, could only be by their realising before the bills of exchange became due.

Probably the right to realise would also accrue if the drawer had undertaken to put the banker in funds to meet the bills a specified time before their maturity and had failed to do so, as this would constitute a default.

In the absence, however, of some such agreement or of a definite power to sell at any time, the banker would not be entitled to realise until he had paid the bills. Even then it would seem desirable that he should apply to the customer to reimburse him, and give him notice that, failing his doing so within a limited time, he will proceed to realise the securities.

Title-deeds of
land.

Title-deeds, whether of freehold or leasehold land, though of themselves in the nature of chattels, are too intimately connected with the land itself to come within the power of sale implied in a pledge. Another reason assigned for this exemption is the hardship and inconvenience that would accrue from allowing them to be dealt with, apart from the land, on their small intrinsic value as compared with their relative importance to the

landowner. They can therefore be treated only as evidence of an equitable mortgage of the land itself.

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The doctrine of so-called quasi-negotiability, or negotiability by estoppel, would probably hardly suffice to give a right of sale on the pledge of documents not otherwise negotiable. The estoppel goes rather to the authority of the agent to deal with the document than to its nature, of which the pledgee is as competent to judge as the pledgor. Where, however, the representation, express or implied, affirms the negotiability of the document, or where a memorandum gives an express power to sell such document, the pledgor could not dispute the pledgee's right to sell.

Quasi-negotiability.

In all cases of doubt as to whether the deposit is the legitimate subject of pledge, it is nevertheless advisable to treat the transaction as one of equitable mortgage. (Cf. *Harrold v. Plenty*, [1901] 2 Ch. 314.) Outside chattels and negotiable instruments the pledgee would be unable of himself to make satisfactory title to a vendee.

Equitable mortgage.

Thus with the deposit of certificates of stock or shares. Without transfer from the holder, the deposittee could not complete a sale. Unless the depositor voluntarily executes such transfer, as he is bound to do by the agreement implied in the deposit, resort must be had to the Court, which will order foreclosure, transfer, or sale at the option of the mortgagee. A memorandum by deed of equitable deposit, not amounting to a transfer of the shares, would give a right of sale under the Conveyancing Act, 1881, s. 19, but would give no power to transfer the legal right in the shares or stock. (Cf. *In re Hodson and Howe*, 35 C. D. 668.)

Stocks and shares.

Different considerations prevail when stock or shares are actually transferred to a banker by way of security. He is then in a position to sell and transfer, subject to the right of the mortgagor to redeem. If there is a mortgage deed or agreement apart from the mere transfer,

Where legal transfer.

CHAP. XXI. the banker must abide by its terms as to sale or otherwise. If such deed contains no power of sale, the banker should treat the power of sale given by sect. 19 of the Conveyancing Act, 1881, as imported, and adopt the procedure prescribed thereby, giving three months' notice before selling. It would seem doubtful whether the mere transfer under seal by way of security constitutes a mortgage by deed within the Conveyancing Act, 1881, so as to impose the conditions of sect. 19, as to notice. The wording of the Act appears applicable only to a deed directly creating or embodying the mortgage. Where there is nothing which can be termed a deed of mortgage and no inconsistent agreement, the mortgagee has an inherent power to sell on default; if no date is specified for payment, he can exercise such right on non-compliance with a notice requiring payment on a fixed day at a reasonable future date, and stating that on failure of payment sale will be proceeded with. A month's notice would seem reasonable (*Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579).

Statute of
Limitations.

Where securities, stocks, or shares have been equitably mortgaged, the remedy by foreclosure or sale is not barred by the expiration of the period which, under the Statute of Limitations, would preclude the recovery of the debt for which the security was pledged.

The personal remedy and the remedy against the property are independent, and there is no statutory provision relating to personal property similar to that relating to land, extinguishing the title to it after a certain time. (*London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Stubbs v. Slater*, [1910] 1 Ch. 639; but the attribution in the latter case of payments in to unsecured balance must now be read in the light of *Deeley v. Lloyds Bank*, [1912] A. C. 756.)

Equitable
mortgage of
land.

Where the security is an equitable mortgage of land, the remedy is by application to the Court for foreclosure or sale. Even prior to the Conveyancing Act, 1881, the

equitable mortgagee, by deposit of title-deeds, either with or without a memorandum, seems to have been entitled to apply to the Court not only for foreclosure but for sale. (See *Fisher on Mortgages*, par. 1004.) The remedy by sale has been questioned by some authorities, but *Fisher's* view is probably correct. Sect. 25 of the Conveyancing Act, 1881, declares the power of the Court to order a sale in cases where foreclosure could be ordered; and in *York Union Banking Co. v. Artley*, 11 C. D. 205, and *Wade v. Wilson*, 22 C. D. 235, sale was ordered on the application of the equitable mortgagees, though in neither case was there any memorandum. (See also *Cripps v. Wood*, 51 L. J. Ch. 584.) Where the memorandum gives a power of sale, the mortgagee can of course sell on his own initiative, but can only confer an equitable title, not convey the legal estate.

And though the memorandum be under seal, unless it amount to a conveyance of the legal estate, the provisions of sect. 19 of the Conveyancing Act, 1881, do not enable the equitable mortgagee to convey more than the equity of redemption (*In re Hodson and Howe's Contract*, 35 C. D. 668), differing therein from the corresponding enactment of Lord Cranworth's Act thereby repealed, which still governs equitable mortgages by deed effected prior to Dec. 31st, 1881. (*In re Solomon and Meagher's Contract*, 40 Ch. D. 508.) A registered charge under the Land Transfer Acts enables the mortgagee to sell the whole estate, legal as well as equitable, though there be no conveyance therein to him of the legal estate.

Where a legal mortgage by deed is taken with conveyance of the legal estate, the mortgagee can either proceed to sell under the power of sale contained in such deed, or, if no power of sale be comprised in the deed, by virtue and subject to the conditions of sect. 19 of the Conveyancing Act, 1881. Legal mortgage.

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There are usually the alternatives of applying for foreclosure, of appointing a receiver, or even of taking possession. The last-mentioned is, however, never adopted in practice.

Disposition
of surplus on
realisation.

In taking securities a margin of value in excess of the liability they are to cover is always allowed. On realisation, if the security brings in more than the debt, the disposition of the balance may give rise to questions.

With regard to bills, notes, and cheques, the distinction previously alluded to (*ante*, p. 409) between taking such documents by way of pledge and taking them as absolute transferee and owner must be borne in mind. In the latter case, the holder is entitled to the full amount irrespective of the value he gave; in the former the surplus must be treated as if it arose from the realisation of any other pledge.

Where security other than land has been given to cover specified indebtedness, and its realisation brings in more than enough to satisfy that indebtedness, and the banker is not affected with notice of any assignment of the depositor's remaining rights or any further charge on the security, he must, of course, pay over the surplus to the debtor or hold it at his disposal.

Can retain
for further
indebted-
ness.

If, however, the depositor is further indebted to the banker, say on general account, the banker can retain the surplus, or a sufficient part thereof, to cover such further indebtedness, by virtue either of his general lien or the right of set-off.

It may at first sight seem curious that immunities attaching to the security itself should not extend to what is only a converted part thereof, but the authorities are clear. (*Jones v. Peppercorne*, Joh. 430; *Inman v. Clare*, Joh. 769; *In re London and Globe Financial Corporation*, [1902] 2 Ch. 416, recognising *Jones v. Peppercorne*.) In *In re Bowes*, 33 Ch. D. 586, North, J., while holding that the bank had no general lien on

the security itself, said that if the memorandum had given a power of sale, or if such power had been obtained from the Court, the surplus proceeds would have probably been retainable by the bank by way of set-off for their further claim against the customer's estate.

The explanation may be that the express or implied power of sale is an incorporated or inherent incident of the deposit, and its exercise terminates any fiduciary relation that may have existed with regard to the security itself.

Cases like *Stumore v. Campbell*, [1892] 1 Q. B. 314, are distinguishable. Where money is deposited for a purpose which fails, there arises a resulting trust which affects the whole sum and puts it outside lien or set-off. In the case of securities lodged to cover a specific advance, the purpose is cover, and, if necessary, realisation; on a legitimate sale there is, therefore, no failure, but fulfilment, and no resulting trust even as to surplus proceeds. The phrase so commonly met with in this class of cases, that the creditor holds the surplus proceeds as trustee for the debtor, would seem to be really only a figure of speech; there is no actual fiduciary relation. The money is, in truth, held for the debtor's account, or as money had and received to his use; in other words, constitutes a mere debt to him, and so is subject to lien or set-off.

The same holds good with regard to a surplus realised by sale of goods or securities pledged to cover acceptances. It was expressly declared in *Inman v. Clare*, Joh. 776, that the surplus, if any, was subject to the general lien of the banker or broker who paid the acceptances. The drawer's only right is to have the goods or securities or their proceeds applied to the bills, so that no liability, either direct or by increased debit, shall accrue to him in respect of those bills. This right does not affect surplus after satisfaction of the bills.

Surplus of goods or securities pledged to cover acceptances.

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The drawer's right is assignable by agreement collateral to and independent of the bills, but the transferee can clearly take no higher right than his transferor, and has, therefore, no claim whatever with regard to the surplus balance. (*Inman v. Clare*, Joh. 769 ; *Ex parte Dever*, 13 Q. B. D. 766.)

Surplus of
land sold.

Where land is sold under express power in a mortgage, the application of any balance might depend on the terms of the security, but the claims of subsequent incumbrancers, if any, would probably have to be satisfied out of the proceeds before the selling mortgagee could retain monies beyond the sum definitely secured by the mortgage, and expenses. If the mortgage were to cover indefinite advances, the case would of course be different. Where the sale is by virtue of the Conveyancing Act, 1881, sect. 21 provides that the ultimate balance is to be paid to the mortgagor or other person entitled to give receipts for the proceeds of the sale. When the sale is by order of the Court, the purchase-money is always directed to be paid into Court to be dealt with as ordered. Either under the order so made, or the liberty to apply, which is usually reserved, it might be possible for a banker to obtain the surplus or some portion of it in discharge of ulterior liabilities to him of the mortgagor.

CHAPTER XXII

MONEY PAID BY MISTAKE

As already stated ("Money had and Received") the law as to money had and received, under which money paid by mistake falls, is in a state of dissolution or reconstruction. The old tests of whether it was unfair or inequitable that the payer should recover it or the payee keep it, the deductions from Roman law, the theory of unearned increment, are no longer to be depended on; *Sinclair v. Brougham* and *John v. Dodwell* are destructive, rather than constructive, authorities, and it is only when one comes to money paid under mistake of fact that there is any solid foundation to work on.

To make money paid by mistake recoverable, certain conditions must exist.

The mistake must be one of fact, not general law, but the construction of a private document or even a private Act of Parliament has, in equity, been regarded as mistake of fact rather than law. In *Holt & Co. v. Markham*, The Times, Aug. 1st, 1922, Lush, J., seems to have treated misreading of Government circulars as being a mistake of fact, in this sense. In *Kleinwort v. Dunlop Rubber Co.*, 23 Times L. R. 696, acting on a general instruction in ignorance of a special one affecting the case was treated by the House of Lords as a mistake of fact. Mistake of fact.

The tendency would seem towards a liberal view of what is a mistake of fact, so as almost to include a mixed question of fact and law.

Thus Lord Dunedin says, in *Sinclair v. Brougham*,

CHAP. XXII. [1914] A. C., at p. 431: "A familiar case is the paying of money by A. to B. under the mistaken impression in fact that a debt was due, when in truth there was no debt due." It might be said that whether a debt was due or not was not a pure question or mistake of fact.

Between the parties.

The mistake must be between the party paying and the party receiving. It is not sufficient that the party paying should be under a misapprehension as to some fact, and that, but for that misapprehension, he would not have paid the money; the mistake must touch the actual transaction. *Chambers v. Miller*, 13 C. B. N. S. 125, is illustrative of this. A bank paid a cheque on presentation, but immediately afterwards discovered that the customer, the drawer, had no assets to meet it. It was held that the payment was irrevocable and the money not recoverable, on the ground that the mistake was not between the bank and the person who received payment, but between the bank and their own customer. (Cf. *Aitken v. Short*, 1 H. & N. 215.)

It does not follow that the recipient need be under any misapprehension in taking the money, his mind may be a blank on the subject, so long as there is mistake on the part of the payer with regard to a matter between him and the payee. In *Sinclair v. Brougham*, *ubi sup.*, Lord Dunedin says, at p. 433: "Suppose a sum of money was paid by A. to the credit of B. at his bankers under the mistaken idea that a debt was due. Suppose that the next day, before A. had discovered his mistake, B. drew out the whole balance and spent the cash at his credit and went bankrupt. Can it be doubted that A. would have a claim in B.'s bankruptcy which would rank equally with all B.'s ordinary creditors?"

There is nothing here to show that B. was under any mistake as to the payment in to his account by A. The only reliable rule, derivable mainly from *Kleinwort Sons & Co. v. Dunlop Rubber Co.*, 23 Times L. R. 696,

and *Kerrison v. Glyn, Mills & Co.*, 81 L. J. K. B. 465, 28 Times L. R. 106, both in the House of Lords, is that where money has been paid either direct to a man or into his account at his bank, and the payer can establish that he so paid it under a mistake of fact, or mixed fact and law, as in the case of a supposed debt, the payer can claim it back, unless (a) it was paid on a negotiable instrument, or (b) the money was paid to and received by the payee not as a principal but as an agent, and the agent has paid the money over to his principal or otherwise materially prejudiced his position in reliance on the payment before he receives notice of the mistake.

Payment on Negotiable Instruments

Treating the matter on this basis, the first exception is that of payment on a negotiable instrument. In former editions of this book, the dealing with this question was hampered by the divergent views of Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7, and of the Privy Council in *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

Briefly stated, the gist of the decision in the former case was that money paid on a negotiable instrument to an innocent person could not be recovered if he had had the money in his possession for such a period that his financial position might, not necessarily would, be affected if he had to refund.

The attitude taken up by the Privy Council was that the money could be recovered unless the recipient, by lapse of time, had lost his remedy against some previous party by being deprived of the opportunity of giving notice of dishonour.

The author has always had a strong predilection for the former point of view, supported as it was by *Cocks v. Masterman*, 9 B. and C. 902, and other sound authorities.

CHAP. XXII. *Cocks v. Masterman* enunciated the sound principle that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or a dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. So in *Mather v. Maidstone*, 18 C. B., at p. 294, Jervis, C.J., said, "As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity, and when the bill is presented, if the acceptor pays it, the money cannot be recovered back if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery."

In this same case, when it was suggested that the person who had been paid would not be prejudiced if he had to refund, Cresswell, J., said, "The law does not permit any inquiry as to that in the case of negotiable instruments; and it is highly expedient that that should be so."

That is really the key to the whole situation. Certainty is the essence of negotiability, which could not exist without it. To Mathew, J., is due the credit of having first fully expounded it in terms carrying conviction alike to lawyers and business men.

In the much-criticised case of *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7, now recognised as the leading authority, he lays down the law to be derived from *Cocks v. Masterman* in terms even broader than the general proposition contained in that judgment. He held that the ruling principle was, not negligence or the banker's knowledge or means of knowledge, but the right of a holder of a bill to an immediate and conclusive answer as to its fate, on the due date; which is an element essential to the negotiability of the instrument and imperatively demanded by the exigencies of business.

London and
River Plate
Bank Case.

In the *London and River Plate Bank Case* a bill CHAP. XXII.
drawn on the plaintiffs, on which indorsements were forged, was presented by and paid by them to the defendants on August 19th, 1893; some months later the forgeries were discovered and the action brought to recover the money as paid under a mistake of fact.

Mathew, J., held it was not recoverable, and gave judgment for the defendants. It was agreed that there was no evidence of negligence on the part of the plaintiffs and that the defendants had acted throughout in perfect good faith.

After reviewing the cases prior to *Cocks v. Masterman* and expressing his opinion that the question of negligence was not, and could not be, the foundation of the judgment in any of them, Mathew, J., proceeds: "In *Cocks v. Masterman* the simple rule was laid down in clear language for the first time that, when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be that the money can be recovered back; but if it be not, and the money is paid in good faith and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the

CHAP. XXII. holder would have time to give notice of dishonour to the other parties to the bill ; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, is unimpeachable."

Bearing of
judgment.

In the plainest terms, this judgment lays down that, where the payment is on a negotiable instrument, neither the loss of the opportunity of giving notice of dishonour nor any actual prejudice or damage to the innocent holder is necessary to entitle him to keep the money. If he has had the money for such interval that his position may have, not necessarily has, been affected, he can keep it. The judgment further strongly discountenances the view that the banker's duty to know his customer's signature or negligence on the banker's part was the true principle of any of the earlier decisions, and demonstrates the unreasonableness of holding a banker bound to detect a clever forgery of even his own customer's signature.

Imperial
Bank of
Canada v.
Bank of
Hamilton.

In 1902, the case of *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, came before the Privy Council. In that case one Bauer drew a cheque for five dollars on the Bank of Hamilton, leaving a considerable space after the word " five." He got it marked by the Bank of Hamilton and then wrote in the word " hundred " after the " five." He took the altered cheque to the Imperial Bank of Canada, opened an account with it, and forthwith drew out the amount by cheques. The Bank of Hamilton paid the altered amount to the Imperial Bank of Canada on the morning of January 27th, 1897.

The Bank of Hamilton discovered the fraud the next morning, and immediately gave notice to the Imperial Bank of Canada, demanding repayment of 495 dollars.

The Privy Council held the money was recoverable, CHAP. XXII. affirming the decision of the Canadian courts.

After stating that the Imperial Bank was not in fact prejudiced in any way by want of notice on the day of payment, the Privy Council say that it appeared to them that the stringent rule laid down in *Cocks v. Masterman* did not really apply to the case, and proceed : " The cheque, as drawn and certified, *i.e.* for five dollars, was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery ; and Bauer, the drawer and forger, was not entitled to any notice of dishonour by non-payment. There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks v. Masterman*, and recently reasserted in even wider language by Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*, has reference to negotiable instruments on the dishonour of which notice has to be given to someone, who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases when notice of the mistake is given in reasonable time and no loss has been occasioned by the delay in giving it."

Decisions of the Privy Council are not binding on the High Court of Justice (*Dulieu v. White*, [1901] 2 K. B., at p. 677), but they are generally treated as entitled to weight.

In so far as this particular decision conflicts with the judgment of Mathew, J., it has lost any authority it may have had. As before stated under " Money had and Received," the Court of Appeal in *Morison v. London*

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County and Westminster Bank, [1914] 2 K. B. 356, recognised and acted on the soundness of the judgments in *Cocks v. Masterman* and the *River Plate Bank Case*, ignoring the reservations put thereon by the Privy Council. Quotations from the *Morison* judgments will be found where above mentioned, whence it will be seen that Phillimore, L.J., is the only one who refers to the *Imperial Bank of Canada Case*, and as he couples it with *Cocks v. Masterman* and the *River Plate Bank Case*, it is clear that he only cites it for such propositions as are common to all three cases. The apparently self-contradictory *dictum* of Lord Reading is also, it is hoped, satisfactorily explained under the same heading. Any-way he refers to the *River Plate Bank Case*, not the *Imperial Bank of Canada* one.

Notice of
dishonour
test.

One objection to adopting the test applied in this latter case, the loss of opportunity of giving notice of dishonour, has always been that it is hard to conceive any case of payment by mistake where such opportunity would be lost. Mathew, J., appears also to contemplate the possibility of the payee's losing such opportunity, but does not regard it as a material element.

One hesitates before questioning a proposition backed by such authority ; at the same time, there were rules of law existing before the Bills of Exchange Act, and there are now provisions in that Act, which one might otherwise have thought applied to this situation, and reserved to the holder the right to give notice at a later date, even as late as that when the money was reclaimed.

It is clear the holder could not give notice of dishonour when the bill was paid.

Payment is not dishonour. As Gibbs, C.J., said in *Smith v. Mercer*, 6 Taunt., at p. 86 : " The defendants, while the bill continued paid, could not have given notice to the indorser, for the bill was not dishonoured."

If, then, there is any dishonour of which notice has

to be given, it would seem as if it took place when the money was reclaimed rather than when it was paid, and that the notice might effectively be given then. CHAP. XXII.

But if, by some process of relation back, the dishonour be regarded as occurring on the date of presentation and payment, sect. 50, sub-sect. (1) of the Bills of Exchange Act provides as follows: "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving it, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence." Delay in giving notice might be excused.

The sub-section appears distinctly calculated to cover the case of a person who has received payment of a bill or cheque on presentation, and remained in total ignorance of anything to affect his rights until the money is reclaimed on the ground of forgery or mistake. The delay is caused by circumstances beyond his control, and there is no default, misconduct, or negligence on his part to which the delay is referable.

If this view be accepted, the curious result follows that, according to the test laid down by the Privy Council in the *Bank of Canada Case*, and their interpretation of the earlier authorities, there could be no condition of circumstances precluding the bank or other payer from recovering the money paid on a forgery; as the right to give notice would never be lost unless it were by the fault of the person paid, in not giving it within a reasonable time after notice of the mistake and claim.

No doubt the position of prior parties might have altered meanwhile, and the remedy against them prove not so effective, but they would not be discharged for want of notice, and that is the only test laid down by the Privy Council. Moreover, as Cresswell, J., said in *Mather v. Maidstone*, 18 C. B., at p. 294, with regard to

CHAP. XXII. the alteration of position of prior parties : “ The law does not permit any inquiry as to that, in the case of negotiable instruments, and it is highly expedient that that should be so.”

No doubt that was said in answer to a contention that the holder was not injured by being deprived of the opportunity of giving notice, but it would seem equally applicable where the notice, though delayed, was given in time according to law.

Result if this
be so.

If the above argument is well founded, it makes the result of the *Bank of Canada Case* and that of the *River Plate Bank Case* pretty much the same ; the latter is the more logical and has been approved by the Court of Appeal, so it may henceforth be treated as the true exposition of the law.

A mistake of fact which is between the parties may support an action for money had and received although the party paying had means of knowledge of the real facts, of which he did not avail himself, provided he pay honestly. (*Kelly v. Solari*, 9 M. & W. 58 ; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C., at p. 56.)

Where the person receiving the money receives it with knowledge of the facts or *malâ fide*, it can, of course, be recovered from him. (*Kendal v. Wood*, L. R. 6 Ex. 243.)

Forged
signatures.

The existence of a forged signature, whether that of drawer, acceptor, or indorser, on a bill or cheque, is a mistake of fact between the person who pays and the person who presents the instrument and receives payment in ignorance of the defect. (*Cocks v. Masterman*, 9 B. & C. 902 ; *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7 ; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.) Both parties believe the document to be authentic in all respects ; whereas it may in some cases not be a negotiable instrument at all, while in others a material element, supposed genuine, is only a sham.

Negotiability and its exigencies being the root of the matter, the principles above set forth must be confined to cases where the payment is made on an instrument possessing, at least in some degree, the character of negotiability. That is clearly deducible from all the authorities.

One must rule out documents on which all the operative signatures or the only operative signature are or is forged, such as a cheque on which the drawer's ostensible signature is a forgery and on which there is no genuine indorsement. If the cheque in the *Bank of Canada Case* was, *quoad* the raised amount, not a negotiable instrument, but a mere sham, as the Privy Council held, a cheque, on which the only professingly operative signature is forged, cannot be a negotiable instrument, but must be a sham *in toto*.

In the same way, Lord Halsbury, speaking of the documents in *Vagliano's Case*, said: "I have designedly avoided calling these documents bills of exchange. They were nothing of the sort."

It cannot be suggested that the exigencies of negotiability require that a bogus instrument should be treated as a real one for any possible purpose. That would be as much contrary to reason and public policy as to hold a man entitled to retain the change he had, possibly innocently, obtained for a counterfeit sovereign.

But a document, sham in its inception, may, by the addition of a genuine operative signature, become a negotiable instrument, at any rate by estoppel. A document is fairly termed a negotiable instrument when a person, or a succession of persons, can acquire rights upon it, independent of previous forgeries or equities. A genuine acceptance of a forged drawing; a genuine indorsement where either drawing, acceptance, or prior indorsement was or all of them were forged; a genuine indorsement of a cheque with a forged drawing; any of these would give a person taking the document in good

Instruments
become
negotiable.

CHAP. XXII. faith and for value a remedy on it against such acceptor or indorser. Such remedy may be only by estoppel; sect. 55 precludes any acceptor or indorser from denying to a subsequent holder in due course the genuineness of any previous signature, in the case of indorsers, the validity of the bill, and imposes liability to such holder in due course. The words of the section, "The acceptor of a bill," "The indorser of a bill," indicate that, at least as against such signatories, the document, whatever its previous status, is a bill, a negotiable instrument. In *Price v. Neal*, 3 Burr. 1355, the drawer's signature was forged on a bill. It was accepted and paid to an indorsee. Acceptor sued indorsee for the money.

In the *River Plate Case*, Mathew, J., referring to that case, said: "It seems to me the principle underlying the decision is this, that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position, and no single case has been produced to me in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered." Mathew, J., does not treat *Price v. Neal* as based solely on the estoppel of the acceptor; if he regards it as supporting his doctrine of exigencies of negotiability, it shows that a sham instrument may become negotiable by one added signature. The same might be deduced from the references in the *Bank of Canada Case* to the absence of indorsees. That seems to imply that if it had been once genuinely indorsed, the cheque, sham as it was, would have come within the rules applicable to negotiable instruments, whatever those rules might be. Again, Mathew, J., implies that the protection is not founded on any position of holder; the payee's indorsement was forged in the *River Plate Case*. Where there is any anterior forged indorsement, a man is

not holder of the real or whole bill, but only a technical holder by estoppel against those precluded from disputing his title; where there is only one indorsement and that forged, he is not a holder at all. But when paid, he holds the money as having been paid him on a negotiable instrument, not on any claim as holder. CHAP. XXII.

The extension by the *Morison Case* to the collecting banker of the full benefit of the doctrine of the exigencies of negotiability is a valuable concession. It might well have been argued that the principle could only be invoked by one who took the instrument as holder in the strict commercial sense, the foundation and justification of the rule being the upholding the credit and circulation of a recognised medium of mercantile exchange, and securing its acceptance as part of the currency. But in the passages previously cited (p. 286) the Court expressly base the protection of the collecting bank, acting as agent, on the ground that they had been paid on a negotiable instrument and altered their position by paying the money to the customer before it was reclaimed; deliberately preferring this line of defence to the equally available one of the agent who has innocently received money and paid it away to his principal before it is sought to recover it from him.

Mere transfer by delivery of an instrument professedly payable to bearer, but really only a sham, would not impart a negotiable character to it. The obligations arising from such a transaction are merely those of a warranty attaching to the chattel character of the bill or whatever it purports to be.

Assuming then that a mere sham is not a negotiable instrument and that payment thereon can in ordinary cases be recovered as money paid under mistake of fact, the question has been asked whether there is an exception where the payment is made by a banker, accepting a forgery as his customer's signature.

Payment on
forgery of
customer's
signature.

CHAP. XXII.

This question is not likely to arise in practical form. There would either be some endorsement on the instrument, bringing it within the general rule, or it would have been presented by the fraudulent party, who would not, even if found, be worth proceeding against.

The only case one can conceive is that of a bearer cheque with drawer's name forged or a self or order cheque with drawer's name and indorsement forged, passed to an innocent person, and paid to him by the drawee bank. Of course there is no protection to the banker in either case. The article is not a bill or cheque, it is not drawn on a banker, sect. 60 does not apply nor does sect. 80. There could be no effective crossing. If paid in to a banker for collection, that banker's customer would still be the proper person to be sued; if taken for value, that banker might be sued. (See *River Plate Bank Case*.) The improbability of the paying bankers tracing the person they paid, if they paid over the counter, reduces the hypothetical case to one where the instrument is presented through a bank. Assume this state of affairs. Does the fact that the banker has paid the document on the forged signature of his customer preclude him from recovering the money from the innocent payee or his banker?

Question of negligence.

It would be idle to deny that, in well-nigh all the earlier cases, judges do talk about the banker being bound to know his customer's signature, and about negligence on the banker's part as precluding recovery.

Mathew, J.'s, judgment has sometimes been read as laying down that negligence had nothing whatever to do with the question. That is hardly so. His lordship declined to recognise it as the ruling principle of any of the previous cases, as was contended on behalf of the plaintiff bank. The case was one of forged indorsement, as to which no duty of recognition could be alleged, and it was admitted the plaintiff bank had not been negli-

gent. In all the previous cases, as in the one before him, the document had possessed some negotiability ; and Mathew, J., held that the real ground of those earlier decisions was the same as that of his own, namely, the maintenance of negotiability.

That would reduce the expressions of the earlier judges, as to duty and negligence on the banker's part, to *obiter dicta* ; but they are so strong and numerous that they cannot be altogether ignored.

It is a common phrase that " a banker is bound to know his customer's signature " ; but it is a misleading and an inaccurate statement. There can be no such legal obligation. The real position is that if the banker pays away his customer's money in reliance on a signature's being his customer's, which is not so, he cannot charge the customer with that payment.

Banker and
customer's
signature.

Even if it were a duty to know the customer's signature, it could only be a duty to the customer ; it could not possibly extend to third persons, such as the payee of a cheque. So with the suggested negligence ; there is no duty to the payee or holder to take care, and without such a duty there can in law be no negligence.

There would not appear in any of the earlier cases to have been any definite finding by a jury of negligence against the banker. The term is invariably used, by those judges who employ it, in close connection with the supposed duty of the banker to know his customer's signature.

The supposed negligence really seems the outcome of defective evolution. The duty of the banker to know the customer's signature is assumed. There is no indication of the stages by which that absolute duty is transformed into a duty to take care, and the correlative right to have care taken transferred from the customer to the payee or holder. There is nothing to show the breach of that

CHAP. XXII. duty. As Mathew, J., pointed out, if the forgery was cleverly executed, the banker might not be able, by any amount of care, to ascertain whether the signature was or was not a forgery. So the breach is assumed or its necessity ignored; and the failure of the banker to fulfil his supposed absolute duty to his customer to know that customer's signature finally emerges in the form of a breach of duty to a third person to take care, in other words, negligence of which that third person is entitled to avail himself.

It is of course conceivable that there might be cases of real carelessness on the part of the banker. The signature might present glaring dissimilarity to the customer's ordinary one. In such a case it might be suggested that though, by reason of the absence of duty, there was no negligence in the legal sense, there was a recklessness, a departure from ordinary business habits, which, in a contest between two innocent parties, made it unreasonable that the money should be recovered from the man who was absolutely powerless to prevent the loss by the one who ought to have done so. (Cf. the remarks in *Jacobs v. Morris*, [1902] 1 Ch., at p. 833, as to the effect of a disregard of business habits in precluding a man from recovering money he has paid by mistake.) On the general question, Bayley, J., in *East India Company v. Tritton*, 3 B. & C., at p. 289, might be quoted: "The most favourable view of this case for the plaintiffs is to say that both parties are innocent and free from blame: but even then the maxim, '*Potior est conditio possidentis*' applies," cited with approval in *Guarantee Trust Company v. Hannay & Co.*, [1918] 2 K. B. 623; and the unqualified statements by Bramwell, B., in *Hart v. Frontino & Co.*, L. R. 5 Ex., at p. 115, and Lindley, J., in *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D., at p. 196, as to a banker paying on a forged cheque not being able to recover the money. (Cf. Vaughan Williams, L.J., in

Sheffield Corporation v. Barclay, [1903] 2 K. B. 596, in CHAP. XXII.
the C. A.)

On the other hand, there is the authority of *Kelly v. Solari*, 9 M. & W. 58, that neglect of means of knowledge does not prevent recovery if the payment was made honestly, and that case was cited as apposite in the *Bank of Canada Case*. It was at one time suggested that the money might be recoverable on the ground that the person presenting the bill or cheque for payment ought to be held to warrant its genuineness and his own right to receive payment. The Bills of Exchange Act affords no countenance to any theory of a warranty between holder and drawee; indeed, the whole of that idea was demolished in *Guarantee Trust Co. v. Hannay & Co.*, *ubi sup.*; and the banker's position is not such as to justify the assertion of a warranty or right of indemnity on the lines of *Sheffield Corporation v. Barclay*, [1905] A. C. 392. (See again *Guarantee Trust Co. v. Hannay & Co.*) In any case, the allegation by the banker of such a warranty in respect of his customer's own signature would be somewhat audacious.

What view a Court would take were the question directly before them must be doubtful. Unquestionably they would reject the idea of a banker's supposed duty to know his customer's signature affording any defence to a third party.

Probable
view of a
Court.

But it is conceivable that if they found that there had been real carelessness or neglect of ordinary business precautions on the part of the bank, not merely mistake or omission to resort to sources of information, they might hold that this turned the scale. There would have been ample ground for so holding when the old theories of the equitable basis of money had and received were in force.

And there is always present the idea that in some way or another, possibly on the basis of representation implied by payment, stated by Mathew, J., in the

CHAP. XXII. *River Plate Bank Case* to be the *ratio decidendi* in *Price v. Neal*, a Court would be astute to debar a banker from recovering money he had paid an innocent person on a forgery of his own customer's signature.

When received as an Agent

As already stated, money paid under mistake of fact is well-nigh the only money which can now be regarded as recoverable as money had and received. As also stated, there are, in effect, only two substantial defences to a claim for the repayment of such money. One, that it was paid on an instrument itself negotiable, or possessing attributes of negotiability by estoppel, to an innocent person whose position might be affected if he had to repay, has been dealt with above.

The other position barring the recovery of the money is where it has been innocently received by an agent, and that agent, before notice of the mistake, has paid it over to his principal, or otherwise materially and irrevocably altered his position.

The foundation of this doctrine is *Holland v. Russell*, 4 B. & S. 14, recognised as good law in very many late cases, including the *Morison Case*.

But though the soundness of this principle has never been and cannot be questioned, its application in any particular case may be matter of uncertainty.

The discrimination between principal and agent is left to the jury, if there is one; so is the question whether the agent has materially altered his position since receipt, and the results do not seem to have been altogether satisfactory in some of the cases. Both are treated as questions of fact. It has to be borne in mind that the parties concerned where money is claimed as paid under mistake of fact are the person who has paid it and the person who has directly received it. The interests of

third parties, say, the banker's customer, do not come into the matter at all. CHAP. XXII.

In *Admiralty Commissioners v. National Provincial and Union Bank*, 38 Times L. R. 492, money was paid into the bank to a customer's account under mistake of fact. The bank refused to refund it without the consent of the representatives of the customer, he being dead. The bank contended that it had incurred an obligation to honour cheques to the amount of the payment in, which absolved them from any liability to repay, citing the *Joachimson Case* as supporting this contention. But the plea was unsuccessful, Sargant, J., saying that the *Joachimson Case* only dealt with the normal conditions of banker and customer, and that the undertaking to honour cheques did not extend to amounts standing to the credit of current account if and in so far as it was swollen by an inadvertent payment in mistake of fact.

So, on the other hand, the banker cannot set up lien, overdraft or set-off which he could otherwise claim against his own customer, even where the money has been paid in to him as agent for that customer.

Lien only extends to the property of the customer, which money paid in by mistake of fact is not; set-off only applies to debts between the same two parties; continuance of an overdraft is not sufficient change of position.

The whole learning on the matter is comprised in two cases in the House of Lords: *Kleinwort v. Dunlop Rubber Co.*, 23 Times L. R. 696, and *Kerrison v. Glyn, Mills & Co.*, 28 Times L. R. 106; 17 Com. Cas. 41.

In the former case, the facts were somewhat complicated. Dunlops had received from one Brandt notice that one Kramrisch had assigned to him £3,000 which Dunlops owed Kramrisch. Kramrisch had in fact equitably assigned this to Brandt. Kramrisch also directed Dunlops to pay the money to Brandt. Dunlop had a

CHAP. XXII. previous general order from Kramrisch to pay monies due to him into Kleinworts, as they were financing him in various transactions; they were not doing so in the particular one which involved this £3,000. Through a mistake of some of their officials, Dunlops, acting on the general, not the particular order, paid the £3,000 to Kleinworts by cheque, presumably for Kramrisch's account. Brandt sued Dunlops for the assigned debt, and under the judgment of the House of Lords (*Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454) recovered judgment for the £3,000.

Dunlops then sued Kleinworts for the £3,000 paid to them as having been paid by mistake of fact.

In the first instance the case was tried before Channell, J., and a jury.

The questions and answers to and by the jury further complicated matters.

They were: (1) Was the money paid to Kleinworts as principals or agents? Answer, "It was paid as agents for Kramrisch."

(2) Did Kleinworts receive the money as principals or agents? Answer: "As principals and in their own right."

These answers seem contradictory; presumably the first applies to the payment by Dunlops, and the answer means that Dunlops regarded Kleinworts as agents: the second that Kleinworts regarded themselves as principals.

(3) Were Kleinworts led by Dunlop's mistake to alter their position with regard to Kramrisch to their own disadvantage? Answer, "No."

That position was as follows: At the time Kleinworts received the money they had allowed Kramrisch to exceed an agreed overdraft of £100,000 he had with them. They placed the £3,000 to the credit of this account and continued it for some time longer, making further advances.

The House of Lords affirmed the judgment at the trial and of the Court of Appeal giving judgment for Dunlops. CHAP. XXII.

This case embodies several important propositions. They are as follows :

1. An exceedingly liberal interpretation of what may constitute a mistake of fact. Analysing the case, there was really nothing more than the acting under order A from Kramrisch instead of on order B from him, a mistake induced by omissions on the part of the plaintiff's own people.

2. The negation of the efficacy of crediting the money to an overdrawn account, setting it off against a debt, or asserting any lien on it, on the principles above stated.

3. The definition of the respective positions of the man who takes as principal and the man who takes as agent money paid under mistake of fact. As before stated, the answers of the jury to the first two questions left this question somewhat at large on the facts, but the principle was none the less established by the judgments.

The Lord Chancellor said that Dunlops claimed that, in receiving the money, Kleinworts were really principals, and therefore liable to repay it, whether they had paid it over to others or not. Kleinworts claimed that the money had been paid to them as agents, and that they had accounted for it to their principals in a way equivalent to payment. In the view he took of the case, that was immaterial, for it was indisputable that, if money paid under a mistake of fact is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received. And that that was the case there.

Lord Atkinson reviewed all the authorities, and said : " They seem to establish that whatever may in fact be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he will

CHAP. XXII. be liable to refund it if it be established that he dealt as a principal with the person who paid it him. Whether he will be liable if he dealt as an agent with such a person will depend on this, whether, before the mistake was discovered, he had paid over the money he received to the principal, or settled such an account with the principal as amounts to payment or did something which so prejudiced his position that it would be inequitable to require him to refund."

That is a clear and complete statement of the position, on very high authority.

4. That crediting to customer's account goes for nothing, that existence, continued existence of an overdraft far exceeding the payment in, is of no use; that neither lien nor set off against the customer avails against the claim of the payer by mistake, as constituting prejudicial change of position.

On this point the House of Lords was naturally somewhat hampered by the finding of the jury on question 3.

The Chancellor said that it had been contended at the trial that Kleinworts would not have continued, as they did continue, to make advances to Kramrisch if it had not been for this payment of £3,000 by Dunlops. The jury in their answer to the third question refused to accept this view; they considered that Kleinworts would have acted in exactly the same way if no payment had been made by Dunlops at all. There was evidence to support that finding, and so Kleinworts had not altered their position at all.

Lord Atkinson was not altogether satisfied with the finding of the jury on the third question, but he agreed it could not be disturbed, and that consequently it must be taken that Kleinworts had not altered their position to their disadvantage in consequence of the payment.

The other Law Lords concurred.

One is left to infer that if further advances had been

made, definitely on the strength of such payment in, that would have been a sufficient alteration of position ; but had that question been material in the case, it seems quite possible it would have raised the further one, whether there was not some other fund or source to which Kleinworts could resort for repayment of such advances. (Cf. *Bavins v. London & South-Western Bank*, [1900] 1 Q. B. 270.)

5. Dunlops paid Kleinwort by cheque. At first sight, it might seem strange that while money innocently received on a negotiable instrument, whether by principal or agent, is not recoverable as paid under mistake of fact, unless immediately reclaimed, money paid by cheque should have been recovered in this case.

But there is nothing in it. There was nothing wrong with the cheque itself, no mistake of fact affecting it ; exigencies of negotiability only touch the instrument itself ; its negotiability was in no way impugned ; it was paid to the payee, treated as money, and the action would have lain just the same if Dunlops had paid Kleinwort in sovereigns.

Kerrison v. Glyn, Mills & Co. (28 Times L. R. 106 ; 17 Com. Cases, 41) was a simpler case. Under a mistake of fact, Kerrison paid money into Glyn, Mills & Co.'s to the account of a customer who owed them a much larger sum on overdraft. They entered the payment in their books, and when Kerrison claimed it, set up their lien. They had made no further advances on the strength of the payment in. The bank relied on *Foley v. Hill* as establishing their right of lien. The House of Lords said, with regard to that case, that the language employed there was used solely with regard to the relation between a banker and his customer, negating the fiduciary character of the former, not affecting the rights of outside persons. It was not meant to be applied and did not apply to the case of money paid by such persons under mistake of fact. Lord Shaw said he did not think it would be correct, either

CHAP. XXII. in law or in business, to permit the recipient to impound money which his principal could not have honestly or legally retained. There being no right of lien and no further advances, the bank's position would not be prejudiced by their having to repay, which they had to do.

The solvency or insolvency of the customer appears to make no difference. The fact that the banker has little or no chance of getting out of the customer the money he has to refund does not enter into the question of whether he has prejudicially altered his position in reliance on the payment in.

As suggested above, even where the agent's position would otherwise be definitely prejudiced if he had to repay, as when the customer has drawn out the money, that will not obviate the necessity of repayment if the banker has means of rehabilitating his position, as where the customer's account is in credit to an amount enabling it to be debited with the money the banker has to repay. (See *Bavins v. London & South-Western Bank*, *ubi sup.*)

Pressed as it has been, the later doctrine of money paid by mistake strikes one as rather harsh ; and it seems open to question whether justice was not better served by the old system of the respective equities of claiming or retaining and the preference of the possessor.

It is somewhat difficult to justify the negation to the man who takes as principal of any such protection as is afforded the agent by alteration of position. In *Holts v. Markham*, *The Times*, Aug. 1, 1922, the defendant had invested the money paid him in a company and had lost it all, and said repayment to the plaintiffs would involve him in bankruptcy. But, apparently, it was only importation of *Skyring v. Greenwood*, not relevant to the main question, which enabled the judge to decide in his favour.

CHAPTER XXIII

GUARANTEES

ONE of the commonest methods by which bankers protect themselves against loss on advances or overdrafts is by taking a guarantee. There are advantages attaching to this class of security. It is adaptable to most states of circumstances, present and possible, it entails few positive obligations on the banker, while it enures for him to fall back upon in case of need. There are also disadvantages. The efficacy of a guarantee is absolutely dependent on two things : first, the completeness in form of the guarantee itself ; second, the original and continued solvency of the guarantors.

With regard to the form of guarantee, the difficulty mainly arises, first, from the necessity of defining very clearly the extent to which the guarantors bind themselves, and precluding them from afterwards suggesting that the bank has gone beyond what they undertook to be answerable for ; and next from the necessity of anticipating conceivable contingencies, such as death, bankruptcy, change of firm, amalgamation, taking collateral security, giving time to the principal debtor, receipt of dividends, and the like, and of reserving to the bank the power to act on every occasion in the manner most conducive to its own interests, without prejudicing its right to resort to the guarantors for the ultimate balance due.

Essentials in form.

The law is rightly solicitous for the interests of sureties, and the main object of a guarantee should be to keep a free hand for the bank and a tight one on the

CHAP. XXIII. guarantor. The latter object must not, however, be carried too far. General words might, no doubt, be inserted in a guarantee which, if the guarantor signed it, would make him contract himself out of all the rights of a surety, so far as the auditor was concerned. But it would be doubtful policy to resort to this. A careful guarantor would decline to so bind himself, a careless one would afterwards contend he did not realise what he was binding himself to. (Cf. *Birmingham District and Counties Bank v. Lowry*, C. A., January 25, 1905; *Morning Post*, January 26, 1905.) The surety cannot, however, claim relief on the ground of his own misconception of particular provisions or the general drift of the guarantee. "If the defendant had understood the words of the guarantee he would not have entered into it, and the language carried more perhaps than the parties contemplated, but that is no reason for reading into the guarantee words, which I should have to do to hold the guarantor discharged." (*Per Wills, J.*, in *Stewart and M'Donald v. Young*, 38 *Solicitors' Journal*, 385.)

It is largely a matter of drafting, which is outside the scope of this work. Most banks keep their own stock of guarantee forms; these should be overhauled from time to time, to make sure that they are in working order, up to date, broad and strong enough for the purposes for which they are intended. Prolivity is no criterion of efficiency.

The second necessary element in a reliable guarantee, the financial position and stability of the guarantors, is for the consideration and judgment of the banker himself.

A guarantee is a promise to answer for the debt of another, made to a person to whom that other already is, or is about to become, liable. It must be in writing, or there must be a memorandum of it in writing, signed

Definition of
guarantee.

by the guarantor or his authorised agent, to satisfy sect. 4 of the Statute of Frauds. An agreement to give a guarantee is within the Act; and so subject to the same rule. (*Mallett v. Bateman*, L. R. 1 C. P. 163.) In practice, as will be gathered from the foregoing remarks, there must be a good deal more in writing than could be fairly described as a memorandum.

There are cases at first sight analogous to guarantees, which are not within the Statute of Frauds, such as contracts of indemnity and contracts for the acquirement of property by payment of another man's debt. (*Harburg & Co. v. Martin*, [1902] 1 K. B. 778.) The distinction between a verbal promise to answer for the debt of another and a contract of indemnity is fully defined in *Davys v. Buswell*, [1913] 2 K. B. 47, by the Court of Appeal. The fact that the guarantor is himself interested in the matter calling for the guarantee does not prevent its being a guarantee. (See same case.)

Analogous contracts.

In *Wauthier v. Wilson*, 28 Times L. R. 239, a father and son gave a joint and several promissory note for money lent to the son, who was under age. Pickford, J., held the father liable as guarantor for the son's debt. The Court of Appeal held him liable as the principal debtor. The ordinary transaction, however, by which a banker allows a man credit on another's undertaking to see him paid, is a guarantee pure and simple, for which reason, if for no other, writing and signature are essential.

There are, however, certain points to be considered before dealing with the guarantee itself.

A married woman may be a guarantor and liable to the extent of her separate estate, but any possible suggestion of undue influence on the part of the husband, especially if he be the principal debtor, should be put out of the question. (Cf. *Bank of Montreal v. Stuart*, [1911] A. C. 120.)

Married woman.

CHAP. XXIII.

Disclosure.

The contract of guarantee is not one of those classed as *uberrimæ fidei*, requiring full disclosure of all material facts by one or both of the parties. Non-disclosure by a bank to a guarantor of a customer's overdrawn account of facts from which the bank had suspicions that the customer was defrauding the guarantor was held not to invalidate the guarantee, in *National Provincial Bank v. Glanusk*, [1913] 3 K. B. 335.

The banker is not bound to volunteer to a proposing guarantor information as to the customer's financial position or business habits, however material such information might be. (*Hamilton v. Watson*, 12 Cl. and F. 109.)

If questioned by the intending surety, he must, however, give the requisite information, honestly and to the best of his ability, the occasion justifying disclosure of the customer's account or the customer's authority for such disclosure being implied in the introduction of the surety.

Misrepresentation.

It would seem that any misrepresentation, emanating from the bank, as to the nature, contents or effect of the guarantee would entitle the surety to rescind or treat the instrument as rescinded. In *Carlisle and Cumberland Bank v. Bragg*, [1911] 1 K. B. 489, in the Court of Appeal, the bank handed the draft guarantee to Rigg, their customer. He presented it to Bragg, the proposed surety, telling him it was an insurance paper. Bragg signed. Rigg forged the witness's signature and got the advance. The bank sued Bragg on the guarantee. Judgment for defendant affirmed.

The jury had found that Rigg was not the agent of the bank in the matter, so that the question was not one of undue misrepresentation, but of *non est factum*, whether it was Bragg's deed or not. Buckley, L.J., said, "the true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached

his signature with the intention that that which preceded his signature should be taken as his act and deed. If he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed." Again he says that the effect is the same if the man is incapable of ascertaining or is by false information deceived in a material respect as to the contents of the document which he is asked to sign; which carries the matter somewhat further.

In *Hewatson v. Webb*, [1907] 1 Ch. 537, *non est factum* was held no defence, the misrepresentation being only as to the contents of a deed known by the defendant to deal with property of his. "I have had no case cited which carries the plea further than that a misrepresentation as to the nature and character of the document avoids it." (*Per Warrington, J.*, p. 545.)

Where the representation is made by a person other than the man who seeks to enforce the contract or his agent, it may well be that the misrepresentation must be as to the actual character of the instrument; that where Buckley, L.J., speaks of the man being deceived by misrepresentation in a material respect as to the contents of the document he means as to its contents as a whole, not as to its legal significance or effect or any particular provision therein contained or alleged to be contained.

But where the representation can be brought home to the party seeking to uphold or enforce the contract, it is pretty clear that the character of the misrepresentation sufficient to avoid the contract is not so narrowly circumscribed. *Non est factum* is one thing, misrepresentation is another.

Of course, it would be absurd to contemplate misrepresentation, even innocent, by any of a bank's own staff; but the entrusting the guarantee to the principal debtor, to get it executed by the surety, as was done in

CHAP. XXIII. *Carlisle and Cumberland Bank v. Bragg*, is not an uncommon thing. In that case the jury found that the principal debtor was not the agent of the bank. Had they found otherwise, one can gather that the Court would not have had much difficulty in dealing with the case. In another case, another jury, or the judge, might well find the other way. It is difficult to differentiate between an emissary or messenger and an agent. If the guarantee were sent to the surety in a closed envelope by a bank messenger who was simply to bring it back, there could be no question of agency, even if he took upon himself to make representations as to it.

But where it is given to the principal debtor to get signed, one gets nearer to agency. There would be no distinct agency to make representations, to do anything more than get the signature; but inferences might be drawn pointing to such agency. Something might turn on what was said by the bank when entrusting him with the document. If the manager said: "If you bring this back signed, and witnessed, we will let you have the money," that looks like making him a mere messenger or leaving him to act independently and on his own authority and initiative. If the manager said: "Go and get this signed by Mr. A. and witnessed, and we will let you have the money," that seems to import an element of agency, and what the debtor said and did might, on the jury taking that view, be held binding on the bank, whether the representation, which would infallibly not be innocent, justified the plea of *non est factum* or not. Negligence on the part of the signer is not sufficient to debar him from setting up that it is not his act and deed, or that he was misled by the representation. (See the *Carlisle and Cumberland Bank Case*.) The safest course would seem to be always to have the guarantee signed and witnessed at the bank, so as to

avoid any question of this sort, or else to send it direct to the surety with a simple covering letter, asking him to be good enough to sign and have it witnessed in accordance with previous arrangement, and return it. CHAP. XXIII.

Main Points of an Effective Guarantee

Turning now to the question of the form of an efficient guarantee, the main points to be kept in mind are as follows. If there is more than one guarantor, their obligation must be made several or joint and several. If it be joint only, an unsatisfied judgment against one, save possibly under exceptional procedure, constitutes a bar to any action against the other or others. (*Kendall v. Hamilton*, 4 A. C. 504.) The case of *Morel v. Westmoreland*, [1904] A. C. 11, must not be understood as implying that a similar result would follow when the obligation was joint and several. Judgment
against one.

The judgment against the wife in that case barred the remedy against the husband, even on the supposition of an original several liability, because the liability of husband and wife could only be alternative, being that of principal and agent, and the judgment against one operated as a conclusive election. (Cf. *French v. Howie*, [1906] 2 K. B. 674.)

The remedy against joint and several guarantors is not alternative, but cumulative, until the whole debt is not only recovered, but satisfied.

From the point of view of the guaranteed person a guarantee by each of the co-guarantors severally would be quite satisfactory ; but, as above shown, the fact of its being joint and several does not affect him, and it may have advantages for the guarantors.

The guarantors should always bind themselves, their executors and administrators ; and if under seal, their heirs as well. The executors or administrators would in any event be bound, but their specific inclusion may

CHAP. XXIII.

Limited or
unlimited.

be useful in the case of death of the surety and notice thereof, hereinafter mentioned.

It may be intended that the guarantor's liability shall be limited. If so, the limitations must be strictly defined. Where a fixed sum is inserted as the limit of the surety's liability, it must be carefully stipulated whether the surety is surety for the whole debt, with the specified limitation to his total liability, or whether he is surety only for part of the debt. The former is the more advantageous for the person guaranteed, inasmuch as it entitles him, on the bankruptcy of the principal debtor, to dividends on the whole debt from his estate, notwithstanding the surety has paid the full sum he guaranteed; whereas in the latter form the surety, having paid his liability, is entitled to the dividends on that amount. (See *In re Rees*, 17 Ch. D. 98; *In re Sass*, [1896] 2 Q. B. 12.)

A slight variation in the wording is sufficient to assign the liability to one category or the other, and it is therefore always desirable to supplement the statement of the liability, and anticipate any question, by adding a clause or proviso, such as proved so efficacious in both the above-mentioned cases, under which the surety contracts himself out of any such possible equity in plain and distinct terms.

Amount
advanced
and amount
guaranteed.

Care must also be exercised that the limitation applies to the amount guaranteed, and not to the amount advanced. If such words as "In consideration that you will advance to A. B. a sum not exceeding £250, I guarantee you the payment of that amount," were used, the guarantee might be invalidated *in toto* by the advance of a sum exceeding £250.

Specific and
continuing.

Guarantees are further divided into specific and continuing. The first are where provision is made for the advance of a specified sum or for advances up to a fixed limit, and the guarantee is applicable only to that par-

ticular advance or series of advances, and ceases on repayment thereof. The continuing guarantee is the commoner form, and is designed to cover a fluctuating or running account, securing the debit balance at any time, irrespective of payments which obliterate past advances. CHAP. XXIII.

Here, again, the plainest terms should be used to express the continuous character of the obligation. The words "ultimate balance" are sometimes used in this connection. They are useful as pointing to the continuing nature of the guarantee; but if there are more accounts than one, and the guarantee is intended to apply exclusively to one, without bringing in any credit balance there may be on another, this must be clearly defined. "Ultimate balance" primarily means the sum finally owing, combining all accounts. (See *Mutton v. Peat*, [1900] 2 Ch. 79.)

If, on the other hand, it is the real ultimate balance, combining all accounts, which it is desired to secure, this should be clearly expressed.

Guarantees, particularly continuing ones, very frequently describe the amount to be covered as that "now or at any future time due or owing from" the principal debtor. This appears an undesirable form. Although it has passed without objection in many cases (e.g. *In re Rees*, 17 C. D. 98; *In re Sass*, [1896] 2 Q. B. 12), the case of *In re Moss*, [1905] 2 K. B. 307, points to the danger of using such words as "debt," "due or owing," in connection with the principal debtor. On the authority of that case it might well be held that bankruptcy of the principal debtor, the very contingency against which the guarantee ought to be a safeguard, wipes out the debt or precludes it from being due or owing from the bankrupt, so that, under such words as the above, there is nothing for which the guarantor is liable. The case directly decides that interest guaranteed on money due or owing

Question of
"due or
owing."

CHAP. XXIII. from the principal debtor ceases to be recoverable as from his bankruptcy. (Cf. *Stacey v. Hill*, [1901] 1 Q. B. 660.) The liability of the guarantor should be defined as being for all monies advanced to or paid for or on account of the principal debtor and interest thereon remaining unpaid or until repayment thereof, or words to that effect, or otherwise fitted to avoid any such question. (Cf. *In re Fitzgeorge*, [1905] 1 K. B. 462.)

Existing
overdraft or
debt.

It must be stated whether the liability is to extend to existing overdraft or debt, if any, as well as to future advances. This is sometimes involved in the statement of the consideration. It is not necessary that the consideration should be set out in the guarantee (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3). But if it is set out, it should be done correctly. Such forms as "in consideration of your having advanced A. B. £500," or "in consideration of your having allowed A. B. to overdraw his account with you to the extent of £500," are obviously wrong. The mere antecedent debt of a third person is no consideration for a promise.

It is true that the statement of a consideration is not conclusive, and another consideration may be supplied by external evidence. The real consideration, where further advances are not stipulated for, is the forbearance of the creditor to sue or press the debtor. "Where a creditor asks for and obtains a security for an existing debt, the inference is that but for obtaining it he would have taken action which he forbears to take on the strength of the security. (*Per Parker, J.*, in *Glegg v. Bromley*, [1912] 3 K. B., at p. 491.) The existence of this consideration has also been implied from the nature of the transaction as between business men. (See *per North, J.*, in *In re Clough*, 31 C. D., at p. 326, and *Fullarton v. Provincial Bank of Ireland*, [1903] A. C., at p. 316.) But, in the absence of statement in writing, it must always remain a matter of deduction whether any claim was contem-

plated, and if so, whether it was forborne at the request of the guarantor. (*Miles v. New Zealand &c. Co.*, 32 Ch. D. 266.) CHAP. XXIII.

Where, therefore, the only consideration is the forbearance to press for an existing debt, this should be clearly specified, and the time for which such forbearance is to last stated. "Reasonable time" is too vague and incapable of definition, while "so long as you may think fit," or words leaving the respite entirely in the hands of the creditor, would render the sufficiency of the consideration doubtful.

The method by which future advances are to be made should be formulated in accordance with the intention of the parties, or in such general terms as to include all methods likely to be adopted, as, for instance, the acceptance and discounting of bills. Interest and banking charges should be provided for. With regard to the former, it is sometimes desirable to stipulate for the method in which it is to be, or may be, charged or reckoned, as by yearly or half-yearly rests; and some draftsmen insert a provision that this method of charging shall continue, notwithstanding that the relation of mortgagor and mortgagee has superseded that of customer and banker. This would only come into operation where a mortgage was taken for a specific sum, and not for a fluctuating balance (see *National Bank of Australasia v. United Hand in Hand Co.*, 4 A. C., at p. 410), and it would introduce much complication if the accounts had to be kept in one way against the customer and in another against the surety.

Method of
future ad-
vances.

Where the guarantee is to be a continuing one the conditions of its determination should be clearly marked. A guarantor is not entitled, without determining the guarantee, to call upon the principal debtor to release or indemnify him. (*Morrison v. Barking Chemical Co.*, 35 Times L. R. 196.) A guarantor is, in ordinary cases,

Conditions of
determina-
tion.

CHAP. XXIII. entitled to determine the guarantee as to future advances at any time by notice, and by paying if so required what is then due on or within the limit of his guarantee. (*Beckett v. Addyman*, 9 Q. B. D., at p. 791.) Even if the guarantee is for a specified period, or is under seal, this right probably exists in equity, if not at law (*In re Crace*, [1902] 1 Ch., at p. 738), unless the banker were under contract bound to make further advances to the principal debtor. (Cf. *Lloyd's v. Harper*, 16 C. D., at p. 314.) It is generally found advisable to impose restrictions on this power. It may be provided that the liability of each guarantor shall only be determinable on the expiration of specified notice, to be given by him in writing, and on payment of all sums outstanding at the date of receipt of such notice, or subsequently accruing by virtue of any engagement entered into prior to receipt of such notice, which, if such notice had not been given, would have been covered by the guarantee. The sort of case to be anticipated is that of a bill accepted by the bank on the faith of the guarantee prior to receipt of notice, but not falling due till after expiration thereof. (Cf. *Holland v. Teed*, 7 Hare, 50, where the form of the guarantee was held to cover such bills.)

Advances
after notice
of determina-
tion.

If so desired, the form might be further extended to cover any and all advances or obligations made or entered into after notice given and before its expiration. There has been a good deal of discussion whether and how far, in the absence of any such provision, purely voluntary advances up to the limit of the guarantee, made during the currency of the notice, are recoverable against the guarantor who has given such notice. The question arose on the following hypothetical case. B. gives a bank a guarantee for A.'s account for £1,000, which runs: "That it shall be a continuing guarantee for the benefit of the said bank, however for the time being constituted, until the expiration of three months after notice in

writing shall have been given by me, my executors, administrators or assigns of determining the same." B. gives notice of withdrawal of his guarantee when A. owes £500. Is it safe to continue transactions on the account after notice; may the balance be increased, and also will B. be liable for the whole if it go up to £1,000? The author's own view was and is that it would not be safe or right to make purely voluntary advances up to the expiration of the notice; that advances or payments during the three months must be confined to the fulfilment of obligations express or implied incurred by the banker to the principal debtor prior to the receipt of the notice, such as the payment of outstanding cheques and the like. This view is based mainly on the duty of the guaranteed party to behave equitably towards the guarantor, and the difficulty of seeing where the object or sense of giving notice comes in, if the guaranteed person on receiving it is at liberty at once to run the amount up to the extreme limit. The object of giving notice is to enable the guarantor to circumscribe his loss; the banker is not prejudiced by not being able to increase that loss. The position is somewhat analogous to that of a first mortgagee for advances, not for any stipulated amount, who receives notice of a second mortgage, and who cannot then make further advances to the detriment of the second mortgagee.

These conclusions have been disputed, mainly on the ground that the principal debtor may have made engagements and undertaken liabilities on the faith of being able to get advances up to the full amount of the guarantee; that the banker's duty is to him, his own customer, rather than to the guarantor, and that the proper construction of such a guarantee sanctions voluntary advances up to the full limit both of the expiration of the notice and the sum guaranteed. Anyway, if licence to take this course is desired, the right to

CHAP. XXIII. do so without prejudice to recovering the full amount of the guarantee should be very clearly expressed therein, and should include obligations undertaken pending the notice but not maturing till after expiration thereof, as well as those maturing during its currency.

Whether the liability of a joint and several guarantor for future advances would be affected by the determination of the liability of his co-guarantor might be doubtful. If the analogy of the death of another joint and several surety is to be accepted, determination by one such surety would not release the other from liability for future advances. Where the sureties are joint only it is an open question whether the death of one stops the liability of the other for subsequent advances. (*In re Sherry*, 25 Ch. D., at pp. 703, 705.) Where the contract is joint and several, the death of one guarantor does not affect the liability of the other for subsequent advances. (*Beckett v. Addyman*, 9 Q. B. D. 783.) In *Egbert v. National Crown Bank*, [1918] A. C. 903, a guarantee by several sureties was to continue "until the undersigned or the executor or administrator of the undersigned shall have given the bank notice." Held, that it could not be determined by one of them, that each and all must combine to determine it. But the decision turned mainly on the wording. It is, therefore, wise to make it quite clear in the guarantee that neither determination by nor the death of one co-surety is to have any effect on the continuing liability of the other for past or future advances.

Formal notice
of death of
surety.

Again, provision should be made for formal notice of the death of a surety before the liability of his estate for subsequent advances terminates.

Effect of
death.

The mere fact of the death probably does not put an end to the guarantee, which is a contract. *Bradbury v. Morgan*, 1 H. & C. 249, is a direct authority to this effect. But later cases are less positive on the point. In *Harriss*

v. *Fawcett*, L. R. 8 Ch., at p. 869, Mellish, L.J., says : CHAP. XXIII.
 "As mere matter of law, although it is not necessary, perhaps, positively to decide it, I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank to hold that a guarantee worded like this was terminated by the death of the guarantor." In *Coulthart v. Clementson*, 5 Q. B. D. 42, Bowen, J., implies that constructive notice of the death would prevent the bank claiming further advances against the estate of the deceased. In *In re Silvester*, [1895] 1 Ch. 573, Romer, J., dissented from this view, but did not touch the question of the effect of the death. Joyce, J., in *In re Crace*, [1902] 1 Ch., at p. 739, agreed with Romer, J.

It seems admitted that the usual provision for notice of determination by the guarantor applies only to his life, and that the legal representatives after his death can always determine as to future advances by reasonable notice. It is, in the present state of the question, essential that the provision for notice of determination should stipulate for formal notice, not only by the guarantor, if given in his lifetime, but also by his legal representatives, under the name of executors or administrators, in case of his death without having given notice. This would exclude any question as to constructive notice, or acting on the footing of the guarantee being determined. (See *In re Silvester*, [1895] 1 Ch. 573.) Insanity of the guarantor determines his liability for future advances. (*Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833, at the trial, not mentioned in Court of Appeal.)

The danger of releasing a surety by dealings with the principal debtor or a co-surety must always be borne in mind in framing a guarantee, and provided against so far as is deemed necessary. Release of a surety.

CHAP. XXIII.

By release
of principal.

The release of the principal discharges the sureties in any case, because the debt is extinguished. (*Commercial Bank of Tasmania v. Jones*, [1893] A. C., at p. 316.) And where the release is absolute, no language purporting to reserve remedies against the sureties can have any effect. On the other hand, a covenant or agreement entered into between the creditor and the debtor not to sue the latter, with a reservation of rights against the sureties, will not release the latter. (*Price v. Barker*, 4 E. & B. 760.) And even though the document purport to be a release, but it appears therefrom, as by reservation of the right against sureties, that the real intention of the parties was merely an agreement not to sue the debtor, it will be interpreted as such agreement, and the sureties will not be released. (*Green v. Wynn*, L. R. 4 Ch., pp. 204, 206; *In re Whitehouse*, 37 Ch. D., at p. 694; *Duck v. Mayell*, [1892] 2 Q. B., at p. 514.) The novation of a debt by accepting a new debtor in place of the old is a complete release of the latter, which releases the sureties and precludes any such interpretation as the above. (*Commercial Bank of Tasmania v. Jones*, [1893] A. C. 313.)

It would be impossible to hold a surety liable for a debt from a person he had never undertaken to guarantee. If the obligation is to be so shifted, a new guarantee must be taken for the existing debt, and the consideration expressed therein.

“There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety.” (Pickford, L.J., in *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.) But even the release of the principal debtor may not release the surety if the guarantee be so worded as to cover this contingency. It was so held in *Perry v. National Provincial Bank*, [1910] 1 Ch. 464, where the guarantee provided that the bank should be at liberty to give time for payment, accept compositions and make arrangements with debtors.

Where the liability of the sureties is joint and several, the release of one surety releases the other (*Ward v. The National Bank of New Zealand*, 8 A. C., at p. 764; *In re E. W. A.*, [1901] 2 K. B. 642), even though a joint and several judgment has previously been recovered against them. (*In re E. W. A.*, *ubi sup.*)

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Where
liability joint
and several.

But where the liability of the co-sureties is several only, not joint and several, the release of one does not discharge the other, unless that other had a right to contribution in equity, and that right is taken away or injuriously affected by the release of the co-surety. (*Ward v. National Bank of New Zealand*, 8 A. C., at pp. 765, 766.) Theoretically a several surety has the same right of contribution as a joint surety (*Ward v. National Bank of New Zealand*, *ubi sup.*, at p. 765; *Whiting v. Burke*, I. R. 6 Ch. 342), but, if alleging release, the burden is on him to show not only the right but the loss of or injury to it.

Where
several only.

It is not very obvious why a bank should desire to expressly release one of a number of co-guarantors, but there is no harm in providing for it in a guarantee.

Giving time to the principal debtor releases the surety if the time is given by a binding agreement arrived at for good consideration, and the rights against the surety are not reserved. (*Per Lord Herschell in Rouse v. Bradford Banking Co.*, [1894] A. C., pp. 590, 594.) The agreement to give time need not be in writing to be binding; it may even be implied. It usually arises where the principal is pressed for further security, the giving of which constitutes consideration for the giving of time. (See *Overend, Gurney & Co. v. Oriental Financial Corporation*, L. R. 7 H. of L., at p. 361.)

By giving
time to the
principal.

So also the taking a bill from the principal debtor would constitute a giving of time, unless possibly it were clearly shown that it was taken merely as collateral security, not suspending any remedy on the debt. (See

Taking bill
from prin-
cipal.

CHAP. XXIII. *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46.)

Time given to the principal debtor does not discharge the surety if given after judgment recovered against both principal debtor and surety. (*In re a debtor*, [1913] 3 K. B. 11.)

Question as to surety not being injured.

There is some authority for holding that the surety will not be discharged if his remedies are not diminished or affected. But, in view of the judgment in *Ward v. National Bank of New Zealand*, 8 A. C. 755, it would be most dangerous to rely on this. The Judicial Committee there say, at p. 763: "In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured and may even be benefited thereby." The surety is the only judge whether a variation of the contract without his consent is for his benefit or detriment, except possibly in absolutely self-evident cases, as, for instance, the creditor agreeing to take a cheque for £500 in full discharge of a debt of £1,000. (Cf. *Polak v. Everitt*, 1 Q. B. D. 669.)

Against reliance on reservation of rights, there is the opinion of Lord Eldon, who held in *Boulton v. Stubbbs*, 18 V. 26, that a reservation of rights against the surety is of no avail, if the contract for reserve prevents the surety's remedy against the principal.

Reserving right to give time.

In order to avoid any such questions, the guarantee should, in the plainest terms, secure to the creditor the right to give time to the principal debtor in any way he may deem advisable. (Cf. *Union Bank of Manchester v. Beech*, 3 H. & C. 672.)

Taking other securities.

Save as touching the question of giving time, the risk of releasing a surety by taking securities for the debt affects cases where the suretyship takes the form of a note executed by principal and sureties rather than those where a regular guarantee is given. In so far as the doctrine is based on merger, it is not easy to see what

can merge the guarantee, unless it were another one by the same parties under seal. But it might be contended that other securities, though taken primarily for the debt, were in substitution for the security afforded by the guarantee, or, by merging or suspending the debt, affected the liability of the surety. CHAP. XXIII.

There should therefore be a clause that the guarantee is to be in addition to, and without prejudice to, any securities of any kind then or thereafter held or to be held by the creditor for past or future advances; and full power should be reserved to take, vary, exchange, or release such securities, renew bills, and so forth, without prejudice to the guarantee. Power to vary and release securities.

It has been held that the taking of additional security does not, unless it involves the giving of time, of itself discharge the surety (*Overend, Gurney & Co. v. Oriental Financial Corporation*, L. R. 7 H. of L., at p. 361), but in view of what has been said above as to the inference of giving time where security is taken, any question on this point should be anticipated by the guarantee.

It has been deduced from the case of *Duncan Fox & Co. v. North and South Wales Bank*, 6 A. C. 1, that where a creditor holds securities deposited by the principal for his debt he is bound to resort to them first, before he can have recourse against the surety. (Walker on Banking, p. 244.) Creditor not bound to resort to securities before suing surety.

It is true that in that case Lord Watson says, at p. 22, that, seeing the real conflict of interest was between the acceptor and the indorsers, he thought it would be inequitable to compel payment from the indorsers (who stood in the place of sureties) until the securities given by the acceptor (treating him as principal) to the bank had been exhausted; and he further says that he is satisfied that it is a settled rule of equity that, in circumstances analogous to those of that case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

CHAP. XXIII.

Exceptional
nature of
this case.

But in that case the facts were peculiar. The bank had discounted bills for and indorsed by Duncan Fox & Co. accepted by Radford & Co. Before the bills became due Radford & Co. stopped payment. The bills were dishonoured, and Duncan Fox & Co. became liable to the bank. The bank held securities from Radford & Co. to cover advances and other liabilities, but this was unknown to the indorsers. There was nothing due from Radfords to the bank except the liabilities on these bills. Duncan Fox & Co. having got to know of these securities, applied to the bank either to realise them and apply the proceeds in payment of the amounts due on the bills, or to render an account of what was due from Radford & Co., and on payment of that amount by Duncan Fox & Co. to transfer to them securities of equal value out of those in their hands. The securities being also claimed on behalf of Radfords' unsecured creditors, the bank declined to do anything without the direction of the Court, assuming a perfectly neutral attitude, and offering to do whatever the Court ordered. (6 A. C., pp. 8, 10.) There were respondents other than the bank, namely, Radfords, and representatives of the unsecured creditors.

The order originally made, which was ultimately restored by the House of Lords, was that the bank should hand over the securities to Duncan Fox & Co. on payment by them of the balance remaining due to the bank. (See 11 Ch. D., at p. 91.) The real question was whether Duncan Fox & Co., as indorsers, were entitled to the same rights as sureties on paying the bills; and, save for the words of Lord Watson quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

Contrary
expressions
in same case.

On the contrary, the right to sue the guarantor without resorting to the securities is clearly recognised by Lord Selborne, *ubi sup.*, at pp. 10, 14, and by Lord

Blackburn at pp. 18, 20. (See also *Ex parte Brett*, L. R. 6 Ch. 841, where Mellish, L.J., lays down the broad rule that a surety has no right or interest in securities until he has paid the debt.) In the Scottish case of *Ewart v. Latta*, 4 M'Queen's H. of L. Cases, at p. 987 (new ed., p. 829), Lord Westbury, C., says: "Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied." At p. 989 (new ed., p. 830) he says: "The same principle prevails also in the law of England, that if a debt be due from A. and B., and B. be the surety, B. has no right in respect of that debt as against the creditor unless he undertakes to pay and actually does discharge it."

It may therefore fairly be assumed that Lord Watson's remarks above quoted were intended to be, or must be, confined to cases where no claim or objection is raised by the holder of the securities; and that no general proposition is to be deduced from them.

There appears, therefore, no absolute necessity for the creditor to secure by the guarantee the right to resort to the surety without first realising securities held from the principal.

The surety is entitled to a set-off of debts due from the creditor to the principal debtor arising out of the transaction on which his own liability is founded. (Bechervaise v. Lewis, L. R. 7 C. P. 372.)

Surety's right
of set-off.

This principle is not likely to operate in the case of

CHAP. XXIII. a guarantee to a bank. There would be no credit balance on the guaranteed account, and credits on another account are outside the question. (*York City and County Banking Co. v. Bainbridge*, 43 L. T. N. S. 732.)

Right to close
account on
determina-
tion.

The right to close the account on the determination of the guarantee and open a fresh one, to which monies paid in by the customer, and not otherwise allocated by him, can be carried, instead of being applied in reduction of the guaranteed account, is established by *In re Sherry*, 25 C. D. 692, and recognised in *Deeley v. Lloyds Bank*, [1912] A. C. 756, but the right is usually reserved in the guarantee.

Provision for
change in
parties.

Where the account or transactions guaranteed is or are those of a partnership, the guarantee should provide that it shall not be affected by any change in the constitution of that partnership. This is the more necessary because under the Partnership Act, 1890, s. 18, any change in the constitution of the firm for or to which the guarantee is given revokes the guarantee as to future advances "in the absence of agreement to the contrary," and the same Act repeals sect. 4 of the Mercantile Law Amendment Act, 1856, which admitted "necessary implication from the nature of the firm or otherwise."

In the case of a guarantee given to a private bank, provision must be made for the contingency of any change in the constitution of the bank partnership.

Where bank
is a corpora-
tion.

Where the bank is a joint stock one or otherwise incorporated, the matter is different. The Partnership Act, 1890, only deals specifically with "firms," without defining them. From the nature of the Act the term must, however, be taken as equivalent to "partnerships." But the principle involved is a general one; that change in the identity of the person to or for whom the guarantee is given revokes it as to future advances.

A bank, joint stock, or otherwise incorporated, is not a firm; it is a corporation, a legal entity, apart from the

members composing it. Any internal changes produced by transfer of shares, election of directors, and so on, do not work any change in the corporation. So far there could be nothing to affect the liability of the surety. And, as before suggested with reference to securities for advances, the opening of new branches is no change in constitution. The corporation remains the same. Branches and the head office constitute but one undertaking. (*Prince v. Oriental Bank Corporation*, 3 A. C. 325.) CHAP. XXIII.

The absorption of another bank, a small into a large concern, whereby the identity of the small one is obliterated, would, as regards guarantees given to the absorbing bank, stand on the same footing as the opening of a new branch. (*Capital and Counties Bank v. Bank of England*, 61 L. T. N. S. 516; *Prescott, Dimsdale & Co. v. The Bank of England*, [1894] 1 Q. B. 351.) Absorption.

With regard to guarantees held by the absorbed bank, these, so far as a definite amount is due at the time of absorption, can be made available in the hands of the absorbing bank. In *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833, a guarantee was held by Bank A, which was absorbed by Bank B. In a sense the account was continued with Bank B, but it was a dormant loan account throughout. No notice of any change was given to the surety. He contended that he had been discharged by novation, the debtor having accepted Bank B as his creditor. The Court of Appeal held there had been no novation, and the surety was not discharged.

Pickford, L.J., said: "There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must affect a material alteration in his position. . . . In either case the transferee of the debt, whether by

CHAP. XXIII. novation or assignment, is the person with whom the surety has to deal, and as the liability is already ascertained, it is a matter of no consequence to whom he has to pay it."

The Court further held that it made no difference whether notice were given to the surety, and that there was no novation because novation required the assent of the old bank, the new bank, and the surety; and that in the absence of such surety there was no evidence that the rights of the old bank were to cease.

Bankes, L.J., said that a creditor may assign his debt or his securities without releasing the surety.

The assignment to the absorbing bank of the outstanding debt by the absorbed one would naturally be provided for and effected by the negotiations and settlement between the two.

This judgment is carefully limited to existing and ascertained debts. There can be neither assignment nor novation of non-existent or possible future debts. The principle is therefore inapplicable to subsequent advances by the absorbing bank. It could not, in ordinary circumstances, be argued that the surety had guaranteed advances from Bank B when it was Bank A he had agreed with, and he knew nothing of the change. (Cf. *per* Lord Eldon in *Ex parte Kensington*, 2 V. & B. 83.) If there is nothing else to rely on, and unless the account be ruled off and a new one opened, the surety might fairly contend that monies paid in and not otherwise allocated by the principal should be attributed to the guaranteed debt, leaving subsequent advances uncovered.

Amalgama-
tion.

Amalgamation, as distinct from absorption, stands on a different footing. "An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either; it must depend upon the nature and

character of the businesses amalgamated and how the amalgamated business was subsequently carried on. In each case it must be a question of fact." (Per A. L. Smith, L.J., in *Prescott, Dimsdale & Co.*, [1894] 1 Q. B., at p. 365.)

It must be remembered that, with regard to guarantees, it is not so much the identity of the business that is the test, as the identity of the persons or the legal entity carrying it on. If on amalgamation the names of both banks are combined and preserved, and the board of directors comprises former directors of each of the original banks, the identity of the one to which the guarantee was given becomes difficult to trace.

Lord Lindley appears to be of opinion that, in the absence of special provisions, amalgamation of two companies would release sureties on guarantees to either separately. (See Lindley on Partnership, 7th ed., p. 139 ; Lindley on Company Law, 6th ed., p. 369, note (s).)

There are two cases where a bond given by way of guarantee to a railway company was only held not to be discharged, as to the future, by the amalgamation of the company with another, on the ground that the Act of Parliament effecting such amalgamation contained special clauses preserving such rights. (*London, Brighton, and South Coast Railway v. Goodwin*, 3 Ex. 320 ; *Eastern Union Railway Co. v. Cochrane*, 9 Ex. 197.) The security in both cases was for the faithful service of an employé, but the principle is equally applicable to a guarantee for advances.

As to guarantees to either of the amalgamated banks, these would apparently stand good in the hands of the combination for ascertained and existing debts due at the time of the amalgamation and assigned by either to the joint body, on the principle of *Bradford Old Bank v. Sutcliffe*. Dicta, such as those in *Buckley on Companies*, 8th edit., 423, and *Bank of Scotland v. Christie*, 8 Cl. &

CHAP. XXIII. F. 214, as to implied novation on amalgamation, must be confined to such existing ascertained debts. As before stated, there can be neither novation nor assignment of what is not in existence. Advances subsequent to the amalgamation would not, in the absence of special terms, come within guarantees to either of the amalgamated banks, and the danger of the existing debt being wiped out by later payments in, unless the account be ruled off and a new one opened, would be at least as present as in the case where the guaranteed bank is absorbed by another.

With regard therefore to new advances by either an absorbing or amalgamated bank, it would be dangerous to rely on guarantees given to the absorbed or either of the amalgamating ones, at any rate unless such guarantees expressly and fully contemplate and provide for such contingency and supply a clear ground of action to the new creditor.

Provision for,
in guarantee.

The usual provision in this connection is that which extends the liability to all advances past and future from the bank, notwithstanding its absorption by or amalgamation with any other bank or banks and to all advances from such absorbing or amalgamated banks in like manner, as if such absorbing or amalgamated bank were the original one to which the guarantee was given.

The only difficulty which occurs to one is that a guarantee can only be a contract with the person with whom it is made. Debts can be assigned, choses in action can be assigned, but, save in cases where the personality of the parties is wholly immaterial, neither the benefit nor the obligation of a contract can be handed over to someone else, without the assent of the other party. Assignability of contracts has been carried far. (*Cf. Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A. C. 414.)

Whether it goes far enough to cover the substitution of a different creditor for the one to whom the surety undertook to be liable, for a future unascertained debt seems open to doubt. CHAP. XXIII.

Lord Lindley, *ubi sup.*, appears to be of opinion that this contingency may be provided against in anticipation by fitting terms. If there are any banks still left to be absorbed or amalgamated, an astute draftsman might devise a clause whereby the guaranteed bank was constituted the attorney of the surety to transfer the benefit of the guarantee, as to future advances, to any bank into or with which that other bank might be absorbed or amalgamated.

Possibly, however, the safer plan is to get a new guarantee to the new bank, or an indorsement on the old guarantee, transferring all obligations thereunder to that bank. A verbal agreement would be no good; a guarantee must be in writing and signed, and no oral terms can be engrafted on or added thereto.

On payment, the surety, if his payment discharges all obligations of the principal to the creditor, is entitled to all securities held by the creditor, in addition to the guarantee, whether they were held at the time the surety became bound or have been subsequently acquired, and whether the surety knew of them or not. (*Duncan Fox & Co. v. North and South Wales Bank*, 6 A. C. 1.)

Surety's right to securities on payment.

The banker, if absolutely recouped by the surety, would have no further need of the securities.

But cases may exist where security is held for a debt, for part only of which the surety is liable. On discharging that liability, the surety is entitled to a proportionate part of the security. (*Goodwin v. Gray*, 22 W. R. 312.)

Where part of debt paid.

The apportionment of the security might be difficult in some instances. The surety would claim something he could realise in order to reimburse himself, and the security might not be divisible. In *Goodwin v. Gray*,

CHAP. XXIII. *ubi sup.*, the surety appears to have been satisfied with a proportionate share of the dividends on the debtor's shares in the bank represented by the defendant, which constituted the security, but it is conceived that he was also entitled to a share in or at least a charge on the shares themselves.

If the surety is surety for the whole debt, but his liability is limited, it would appear from *In re Sass*, [1869] 2 Q. B. 12, that he has no claim against the securities or any part of them until the whole debt is satisfied in full. As before stated, this is the form of liability which should be exacted from the guarantor wherever possible, as being the more advantageous for the bank.

Clause as
to right to
securities.

The addition of a special clause to the effect that all securities held against the debtor's liability were to stand to secure full payment of the ultimate balance remaining unpaid would remove any doubt in either case. (Cf. *Waugh v. Wren*, 11 W. R. 244.) The clause might well be worked in with the proviso as to the bank being entitled to receive dividends in bankruptcy and other payments without prejudice to the liability of the surety for the ultimate balance, which was found efficacious in *In re Sass*, [1896] 2 Q. B. 12. A proviso or clause to that effect should never be omitted.

Other acts or
defaults.

The acts or defaults which would release the surety, outside those generally provided for in a well-drawn guarantee, are such as a bank can readily avoid, if it bear in mind the salutary rule that there must be no variation of the contract, no dealing with the principal, or a co-surety, or with the securities for the debt, behind the back of the surety, or without his consent, either given by anticipation in the guarantee, or prior to such dealing; and that, save in absolutely self-evident cases, the surety is the only judge whether such dealing or variation is or is not for his benefit. (See

Ward v. National Bank of New Zealand, 8 A. C., at CHAP. XXIII. pp. 763, 764.)

The surety who has paid his liability has a theoretical right to call on the creditor to sue the debtor. If the creditor refuse, the surety may, on indemnifying the creditor, sue in his name. (See Mercantile Law Amendment Act, 1865, s. 5.) But the surety can just as well himself sue the debtor on the basis of indemnity or money paid for him, so that the other remedy is not usually necessary.

Right to call on creditor to sue.

The existence of a guarantee does not of itself constrain the banker to any particular system of appropriation of payments in, so long as he deals with the accounts in the ordinary course of business. In the absence of express agreement, a surety has no right to control the right of appropriation possessed by the person making the payments, or, if he make none, that which is in the payee. (*Williams v. Rawlinson*, 3 Bing. 76; *In re Sherry*, 25 C. D. 692.) Payments in may be appropriated to a pre-existing debt of which the surety has no knowledge (*Williams v. Rawlinson*, *ubi sup.*), or to a new account opened on the close of the guaranteed one. (*In re Sherry*, *ubi sup.*, recognised in *Lloyds Bank v. Deeley*, [1912] A. C. 756.)

No necessity for special appropriation.

Where there is a mere unbroken current account, part of which is covered by a guarantee, the other not, as where the guarantee has been determined, there is, in the absence of appropriation, no presumption that monies paid in are to be allocated to the unsecured rather than the secured portion, or otherwise than in the usual sequence of payments in and out in order of date. (*Deeley v. Lloyds Bank*, *ubi sup.*)

Where unbroken account.

Where the guarantee is a continuing one to secure an ultimate balance, the question of appropriation does not arise, except in the sense suggested by Cotton, L.J., in *In re Sherry*, *ubi sup.*, at p. 706, namely, that credits

CHAP. XXIII. could not be carried to a new account during the currency of the guarantee so as to deprive the surety of the benefit of them in estimating the ultimate balance for which he was liable. (*Cf. Mutton v. Peat*, [1900] 2 Ch. 79; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 883.)

The remedies of the surety who has to pay against the principal debtor or the co-sureties do not concern the banker.

Effect of
Statute of
Limitations
on continuing
guarantee.

Questions have arisen as to the effect of the Statute of Limitations on a continuing guarantee.

In *Hartland v. Jukes*, 32 L. J. Ex. 162, it was contended that the six years began to run in favour of the guarantor as soon as the principal debtor became indebted to the bank, inasmuch as there was then a right of action against the guarantor; but Pollock, C.B., said: "It was contended before us that the statute began to run from the 31st of December, 1855, by reason of the debt of £179 1s. 11d. then due to the bank; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator (the guarantor) in respect of that debt; and we think the mere existence of the debt, unaccompanied by any claim from the bank, would not have the effect of making the statute run from that date."

On the other hand, in *Parr's Banking Company v. Yates*, [1898] 2 Q. B. 460, the Court of Appeal appear to have taken the opposite view. It is true that in that case the account, so far as drawing on it went, had been practically closed more than six years prior to the commencement of the action, but the Court treated the statute as commencing to run in respect of each item on the debit side from the date it came into the account. Vaughan-Williams, L.J., in especial, said that the right of action on each item of the account arose as soon as that item became due and was not paid, and the statute

ran from that date in each case, in favour of both principal and surety. CHAP. XXIII.

Hartland v. Jukes is cited with approval in *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. at p. 839. *Parr's Bank v. Yates* was quoted by Swinfen Eady, J., in *Ascher-son v. Tredegar Dry Dock & Wharf Co.*, [1907] 2 Ch. 406.

There can be little doubt but that *Hartland v. Jukes* is the better authority.

The view taken in *Parr's Bank v. Yates* is altogether inconsistent with the intention and effect of a continuing guarantee. The object of such guarantee is the extension of a real working credit to the principal debtor. There could be no right of action against the guarantor unless there was also one against the principal debtor, and the guarantee would be meaningless if the creditor could demand and enforce repayment of every overdraft within twenty-four hours or less from the time it was granted.

Lord Herschell said in *Rouse v. Bradford Banking Co.*, [1894] A. C., at p. 596, "It is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature." (Cf. *In re Clough*, 31 C. D., at p. 326, *per North, J.*)

There is, no doubt, the difficulty of saying, in the absence of express stipulation, how long the advance is to be outstanding before it is deemed to be repayable; and it must be admitted that the measure above suggested, namely, a practical working credit, is vague and unsuited for general application. But the alternative view is open to equal, if not greater, objections. There

CHAP. XXIII. is another consideration which makes the question one of little practical importance.

In *Bradford Old Bank*, *ubi sup.*, it was pointed out that the contract of the surety was a collateral not a direct one, and that in such case demand was necessary to complete a cause of action and set the statute running. Moreover, guarantees invariably specify the liability of the surety as to pay on demand or when demanded, and in this connection the words are not devoid of meaning or effect, even with reference to this statute, as is the case with a promissory note payable on demand, but make the demand a condition precedent to suing the surety, so that the statute does not begin to run till such demand has been made and not complied with. This in no wise runs counter to the decision in *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, indeed the principle is fully recognised there.

Payment of interest or on account of principal by the debtor does not keep alive the liability of the surety, not being made on his behalf. (See *Bradford Old Bank v. Sutcliffe*, *ubi sup.*)

CHAPTER XXIV

BANKERS' BOOKS EVIDENCE ACT, 1879

THE object of the above Act (42 & 43 Vict. c. 11) is to avoid the inconvenience and dislocation of business formerly entailed on bankers by their being compellable to produce their books in legal proceedings to which they were not personally parties. (*Parnell v. Wood*, [1892] P. 137.) The previous practice was specially vexatious because in theory the books could only be utilised for refreshing the memory of the clerk or officer who made the entries and was summoned as a witness, and the real object of compelling their production was that they were in practice invariably but irregularly put forward and treated as substantive evidence in themselves. (See *per* Bowen, L.J., in *Arnott v. Hayes*, 36 C.D., at p. 738.)

Subject to the specified conditions, this character of substantive evidence is by the Act extended not only to entries in the books themselves, but to duly authenticated copies.

By sect. 3, in all legal proceedings, including arbi- Procedure.
trations (sect. 10), a copy of any entry in a banker's books, that is to say, the ledgers, day book, cash books, account books, and all other books used in the ordinary business of a bank, is received as *prima facie* evidence, not only of the existence of such entry but also of the matters, transactions, and accounts therein recorded. Such evidence is available against anyone; thus copies of entries in the books of defendant bankers can be used as evidence against the plaintiff. (*Harding v. Williams*, 14 C. D. 197.)

CHAP. XXIV.

To be a book used in the ordinary business of the bank it need not be in use every day ; it is sufficient if it be a book kept by the banker for reference if necessary. (*Asylum for Idiots v. Handysides*, 22 T. L. R. 573. Act applied to books about thirty years old, and of an absorbed bank.) To secure the immunity and make the copies admissible in evidence, it must be first proved by a partner or officer of the bank, either orally or by production of an affidavit made by him, that the book from which the entries were copied was at the time of making such entries one of the ordinary books of the bank, as above defined, that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, or the successors of the bank in whose custody or control it was when the entry was made (sects. 4, 5). It must also be proved in like manner that the copy has been examined with the original and is correct.

Presumably also the banker must have given all reasonable facilities to a party authorised to inspect and take copies of entries by an order under sect. 7 of the Act, since it is only when the banker has complied loyally and fully with the requirements of the Act that he is entitled to its protection. (*Emmott v. Star Newspaper, ubi sup.*) The privileges of the Act are confined to banks which have made the proper return to the Commissioners of Inland Revenue, or, being registered under the Companies Acts, have duly furnished to the Registrar of Joint Stock Companies the prescribed list and summary, with a statement of the several places where business is carried on. In the one case a verified copy of the return ; in the other, the registrar's certificate must be produced. (Bankers' Books Evidence Act, 1879, s. 9 ; Revenue Act, 1882, s. 11.)

It has been suggested that these restrictions exclude the Bank of England from the operation or benefits of the Act.

Where the bank itself is a party to the litigation, CHAP. XXIV. it can still be made to produce its books under *subpœna duces tecum*, and, in litigation to which the bank is no party, there is also power for special cause to order the production of bank books, the contents of which could be proved under the Act (sect. 6). It would seem, however, that short of some recalcitrancy on the part of the banker, no such order should be made. (Cf. *Emmott v. Star Newspaper*, 62 L. J. Q. B. 77.)

Any party to litigation who, prior to the Act, could Inspection. have compelled the banker to produce his books, may, before trial, apply for an order entitling him to inspect and take copies of any entries in such books for the purpose of such litigation (sect. 7). Under this section an order may be made by a magistrate before whom criminal proceedings are being taken. (*R. v. Kinghorn*, [1908], 2 K. B. 949.) The granting or refusing such application is discretionary (*Emmott v. Star Newspaper*, *ubi sup.*), and the power to grant it will be exercised with great caution and only on clearly established and sufficient grounds. (*Arnott v. Hayes*, 35 C. D., *per* Bowen, L.J., at p. 738; *South Staffordshire Tramways Co. v. Ebbsmith*, [1895] 2 Q. B., *per* Lord Esher, M.R., at p. 674.) If made at all, the order should be strictly confined to relevant entries, of which copies would be admissible in evidence at the trial. (*Arnott v. Hayes*, *ubi sup.*; *Howard v. Beall*, 23 Q. B. D. 1; *Perry v. Phosphor Bronze Co.*, 71 L. T. 854.)

The power to make such order is not absolutely Accounts of third parties. confined to the accounts of parties to the litigation, but it will seldom, if ever, be exercised with regard to the accounts of third parties unless it be shown that such account is in substance really the account of one of the parties to the litigation, or kept on his behalf, so that the entries would be admissible in evidence. (*South Staffordshire Co. v. Ebbsmith*, *ubi sup.*; *Howard v. Beall*, *ubi sup.*; *Pollock v. Garle*, [1898] 1 Ch. 1.) Where it is

CHAP. XXIV. sought to obtain inspection of the account of a third party, notice of such application must be given to such third party and to the bank.

It would be obviously improper for a banker to give information or other facilities with regard to his customer's account to any party in a litigation except under compulsion of the Court. When, however, an order allowing inspection and copies to be taken has been made and served, there would seem no objection to the bank's supplying the requisite copies, if that be the more convenient course. (Cf. *Emmott v. Star Newspaper*, *ubi sup.*) It is very improbable that a banker would ever now be simply served with a *subpœna duces tecum* in proceedings to which he was not a party. If he were, he might disregard it, the only legitimate method of compelling his attendance being the special order under sect. 6, unless he be in default under one of the previous sections or sect. 7. (Cf. *Emmott v. Star Newspaper*, *ubi sup.*)

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